(6)

Supreme Court, U.S.
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No. 99-8576

IN THE

Supreme Court of the United States

PAUL L. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

MICHAEL L. WALDMAN
(Counsel of Record)
KAMI N. CHAVIS
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
1001 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20004
(202) 639-7000
Counsel for Petitioner

PETITION FOR CERTIORARI FILED MARCH 6, 2000
CERTIORARI GRANTED JUNE 26, 2000

150 pp

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Filed: 11/26/97

U.S. DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS (CHICAGO)

CIVIL DOCKET FOR CASE #: 97-CV-8382

UNITED STATES OF AMERICA,
Plaintiff,

v.

PAUL L.GLOVER,
Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
11/26/97	1	MOTION by defendant to vacate sentence (Attachments) Civil cover sheet (Documents 1-1 through 1-2) (Forwarded copy of motion to U. S. Attorney's Office). (jmp) [Entry date 12/09/97]
11/26/97	2	MOTION by defendant to file a brief in excess of 15 pages; (jmp) [Entry date 12/09/97]
12/4/97	3	MINUTE ORDER of 12/4/97 by Hon. William T. Hart Defendant/petitioner Paul Glover's motion for leave to file brief in excess of 15 pages granted [2-1]. Mailed notice (jmp) (Entry date 12/09/97]

DATE	NO.	PROCEEDINGS
6/15/98	4	MINUTE ORDER of 6/15/98 by Hon. William T. Hart: Government given until 7/6/98 to file answer brief to defendant/petitioner's motion to vacate sentence [1-1]. Defendant/petitioner's reply brief to be filed by 7/27/98. Ruling will be by mail. Mailed notice (vj) [Entry date 06/17/98]
7/6/98	5	MEMORANDUM by USA in opposition to petitioner's 28 U.S.C. Section 2255 motion to correct sentence [1-1] (Exhibits); Notice of filing (jmp) [Entry date 07/08/98]
7/27/98	6	REPLY by Paul L Glover to the Government's memorandum in oppostition to petitioner's 28 U.S.C. 2255 motion (Attachment) (jmp) [Entry date 07/28/98]
9/3/98	7	MEMORANDUM, OPINION, AND ORDER (jmp) [Entry date 09/08/98]
9/3/98	8	MINUTE ORDER of 9/3/98 by Hon. William T. Hart: Defendant's motion to vacate sentence is denied [1-1]. The Clerk of the Court is directed to enter judgment in favor of the government and against defendant denying the Section 2255 motion. If defendant wishes to appeal this order, he must file a Notice of Appeal to the U. S. Court of Appeals for the Seventh Circuit with the Clerk of the Court, U. S. Districct Court for the Northern District of Illinois, 219 S. Dearborn St., 20th Fl., Chicago, IL 60604, within sixty days of the entry of the judgment in this case. Any notice of appeal should be accompanied by a request for a

DATE	NO.	PROCEEDINGS
		certificate of appealability, including a statement as to why a certificate should issue. See 28 U.S.C. Section 2253; Fed. R. App. P. 22(b); 7th Cir. R. 22.1. Mailed notice (jmp) [Entry date 09/08/98]
9/3/98	9	ENTERED JUDGMENT (jmp) [Entry date 09/08/98]
10/19/98	10	NOTICE OF APPEAL by Paul L Glover from judgment entered [9-1], from motion minute order [8-1] and from order [7-1] (FEE NOT PAID) (pp) [Entry date 10/21/98]
10/19/98	11	REQUEST by Paul L Glover for certificate of appealability (pp) [Entry date 10/21/98]
10/19/98	12	STATEMENT by Paul L Glover in support of request for a certificate of appealability [11-1] (pp)[Entry date 10/21/98]
10/21/98	—	MAILED application to proceed without prepayment of fees and affidavit to Paul L Glover (pp) [Entry date 10/21/98]
10/21/98	—	FORWARDED LETTER to Judge Hart regarding certificate of appealability (pp) [Entry date 10/21/98]
10/21/98	—	TRANSMITTED to the 7th Circuit the short record on appeal. Mailed notice to all counsel. (pp) [Entry date 10/21/98]
10/22/98	13	MINUTE ORDER of 10/22/98 by Hon. William T. Hart Defendant's request for a certificate of appealability is granted [11-1]. The following substantial issue of constitutional law is certified for appeal:

DATE	NO.	PROCEEDINGS
		"Whether the potential effect on defendant's sentence of his attorneys' claimed deficient performance can satisfy the prejudice component of an ineffective assistance of counsel claim." Mailed notice (jmp) [Entry date 10/23/98]
11/6/98	14	APPLICATION by defendant to proceed without prepayment of fees and affidavit. (Attachments) (11) [Entry date 11/16/98]
11/24/98	—	TRANSMITTED to the 8th Circuit the long record on appeal consisting of one volume of pleadings with one loose pleadings transmitted under separate certificate. Mailed notice to all counsel. (pp) [Entry date 11/24/98]
12/1/98	15	ACKNOWLEDGEMENT of receipt of short record on appeal USCA 98-4021 (jmp) [Entry date 12/02/98]
12/1/98	16	CERTIFIED copy of Order from the 7th Circuit. (98-4021) It is ordered that all other proceedings in this appeal are suspended pending the decision by this court as to whether to issue a certificate of appealability. The court will take no further action in this appeal until the fee status is resolved (Attachment) (jmp) [Entry date 12/02/98] [Edit date 12/02/98]
12/4/98	17	MINUTE ORDER of 12/4/98 by Hon. William T. Hart Petitioner Paul L. Glover's application to proceed on appeal without prepayment of fees is granted [14-1]. Mailed notice (jmp) [Entry date 12/07/98]

DATE	NO.	PROCEEDINGS
12/4/98	18	MINUTE ORDER of 12/4/98 by Hon. William T. Hart Petitioner Paul L. Glover's application to proceed without prepayment of fees is granted [14-1]. Mailed notice (ar) [Entry date 12/11/98]
12/18/98	19	CERTIFIED copy of Order from the 7th Circuit. (98-4021) It is ordered that this appeal shall proceed to a determination of appellant's fee status on appeal. Briefing schedule in this appeal is suspended until further court order. (jmp) [Entry date 12/22/98]
7/16/99	20	COPY of Order submitted 06/23/99 — decided 07/15/99 from the 7th Circuit. The judgment of the district court if affirmed. (98-4021). (For further detail see order.) (hp) [Entry date 07/20/99]
10/12/99	21	COPY Order dated 10/12/99 from the 7th Circuit. Petitioner—appellant filed a petition for rehearing and petition for rehearing en banc. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore denied. (98-4021) (hp) [Entry date 10/14/99]

Filed: 11/24/98

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

98-4021

PAUL L. GLOVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

DOCKET ENTRIES

DATE	PROCEEDINGS
11/24/98	Federal prisoner's 2255 case docketed. Certificate of Appealability granted 10/22/98. [98-4021] [1122496-1] Fee or IFP forms due on 12/8/98 for Paul L. Glover. Transcript information sheet due 12/4/98. (joce)
11/24/98	Original record on appeal filed. Contents of record: 1 vol. pleadings; 1 vol. loose pleadings. [98-4021] [1122506-1] (joce)
11/24/98	Filed Appellant Paul L. Glover docketing statement. [98-4021] [1122508-1] (joce)
12/1/98	The Antiterrorism and Effective Death Penalty Act requires approval from the Court of Appeals before a second or successive petition may be filed in the District Court. IT IS ORDERED that the

DATE	NO.	PROCEEDINGS
		appellee(s) file a statement advising this court whether the appellant(s) brought a previous petition challenging the same judgment that the appellant now challenges. (See order for further details) DW [98-4021] Statement due 12/14/98 for USA. (patb)
12/14/98		Filed Appellee USA jurisdictional memorandum.[98-4021] [1128272-1] (patb)
12/16/98		ORDER: This appeal shall proceed to a determination of appellant's fee status on appeal. [1122496-1] DW [98-4021] [1129065-1] Briefing is SUSPENDED pending further court order. (kell)
12/29/98		Filed District Court order GRANTING Paul L. Glover leave to proceed on appeal in forma pauperis. Date IFP granted: 12/04/98 [98-4021] [1122496-1] (terr)
12/29/98		ORDER: The District Court GRANTED the appellant leave to proceed on appeal in forma pauperis. Briefing will proceed as follows: [1122496-1] TEP [98-4021] 1. The appellant(s) brief is due on or before 1/28/99 for Paul L. Glover. 2. The appellee(s) brief is due on or before 3/1/99 for USA 3. The reply brief if any is due on 3/15/99 for Paul L. Glover (terr)
1/22/99		Filed 15c appellant's brief by Paul L. Glover. Disk not required. [98-4021] [1140781-1] (patb)
2/23/99		Filed 15c appellee's brief by USA. Disk filed. [98-4021] [1150677-1] (patb)

DATE	NO.	PROCEEDINGS
3/15/99		Filed 15c appellant's reply brief by Paul L. Glover. Disk not required. [98-4021] [1157735-1] (patb)
3/18/99		Possible successive appeal memorandum issued to Circuit Judge Richard D. Cudahy, Circuit Judge Michael S. Kanne, Circuit Judge Ilana D. Rovrier regarding previously considered appeal no(s). 95-3346. [98-4021] [1158516-1] (cint)
4/15/99		Circuit Judge Richard D. Cudahy, Circuit Judge Michael S. Kanne, Circuit Judge Ilana D. Rovner have determined this appeal not to be successive to 95-3346 and shall proceed accordingly. [98-4021] [1122496-1] (cint)
4/15/99		This cause has been determined to proceed without oral argument, pursuant to Circuit Rule 34(f). [98-4021] [1122496-1] (broo)
7/15/99		Filed Circuit Rule 53 order PER CURIAM. AFFIRMED. Circuit Judge Daniel A. Manion, Circuit Judge Michael S. Kanne, Circuit Judge Diane P. Wood. [98-4021] [1122496-1] (hard)
7/15/99		ORDER: Final judgment filed per C.R. 53 order. With costs: n. [98-4021] [1197672-1] (hard)
8/26/99		Filed 30c Petition for Rehearing with Suggestion for Rehearing Enbanc by Appellant Paul L. Glover. Dist. [98-4021] [1209925-1] (patb)

DATE	NO.	PROCEEDINGS
10/7/99		ORDER: Appellant Paul L. Glover Petition for Rehearing with Suggestion for Rehearing Enbanc is DENIED. [98-4021] [1209925-1] (land)
10/15/99		MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: .) [98-4021] [1122496-1] (cove)
12/21/99		Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to March 5, 2000. [1122496-1] [98-4021] (land)
3/16/00		Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 99-8576. [98-4021] [1271101-1] (land)
6/30/00		Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 99-8576. [98-4021] [1303493-1] (joce)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 95CR40

Hon. Judge William J. Hart

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

PAUL GLOVER,

Defendant/Petitioner.

Section 2255 Motion to Correct Sentence

and

Supporting Memorandum and Exhibits

PAUL L. GLOVER, PRO SE
06488-424
P.O. Box 1000
Marion, Illinois 62959

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— Sentencing Transcript

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case No. 95-CR-40-1
Paul L. Glover
Prisoner No. 06488-424

UNITED STATES OF AMERICA

v.

PAUL L. GLOVER

MOTION

1. Name and location of court which entered the judgment of conviction under attack—United States District Court-Northern District of Illinois-Eastern Division

2. Date of judgment of conviction—September 21. 1995

3. Length or sentence—84 months

4. Nature of offense involved (all counts)—Conspiracy to conduct racketeering: offer, accept, or solicitation to influence operations of employee benefit plan: money laundering; fraudulent income tax returns

5. What was your plea? (Check one)

(a) Not guilty ☒

(b) Guilty ☐

(C) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment give details:

N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☒

(b) Judge only ☐

7. Did you testify at the trial?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal answer the following:

(a) Name of court—U.S. Court of appeals for the Seventh Circuit

(b) Result—The decision of the District Court was affirmed

(c) Date of result—December 2, 1996

10. Other than a direct appeal from the judgment of conviction and sentence have you previously filed any petitions. applications or motions with respect to this judgment in any federal court?

Yes ☐ No ☒

11. If your answer to 10 was "yes." give the following information:

(a)(1) Name of court—N/A

(2) Nature of proceeding—N/A

(3) Grounds raised—N/A

(4) Did you receive art evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result—N/A

(6) Date of result—N/A

(b) As to any second petition, application or motion give the same information:

(1) Name of court—N/A

(2) Nature of proceeding—*N/A*

(3) Grounds raised—N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result—N/A

(6) Date of result—N/A

(c) Did you appeal, to an appellant federal court having jurisdiction, the result of action taken on any petition, application or motion?.

(1) First petition. etc. Yes ☐ No ☐

(2) Second petition. etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to Set forth all ground in this motion, you may be barred from presenting additional grounds at later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose in defendant evidence favoring to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jurv which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Denial of Effective Assistance of Counsel.

Supporting FACTS (state *briefly* without citing cases or law) Counsel failed to effectively represent me at sentencing and on appeal, when he failed to argue that the Sentencing Guidelines had been improperly applied. (See attached memorandum in support).

B. Ground Two: The Sentencing Guidelines were improperly applied when the Sentencing Court refused to group offenses.

Supporting FACTS (state *briefly* without citing cases or law): Section 3D1.2 provides for grouping of multi-count offense. The Sentencing Court refused to properly group my offenses, pursuant to Section 3D1.2(b), (c), and (d). (See attached memorandum in support).

C. Ground three:

Supporting FACTS (state *briefly* without citing cases or law):

D. Ground four:

Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B. C. and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

None of the grounds listed in 12 above were previously presented because of Ineffective Assistance of Counsel (See Attached Memorandum In Support).

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) A preliminary hearing George Murtaugh—100 West Monroe Street, Chicago, IL 60603: Thomas Breen—33 West Jackson Blvd, Chicago, IL 60604

(b) At arraignment and plea—Same as above

(c) At trial—Same as above

(d) At sentencing—Same as Above

(e) On appeal—Same as Above

(f) In any post-conviction proceeding—N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding—N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future:—N/A

(b) Give date and length of the above sentence:—N/A

(c) Have you filed, or do you contemplate filing, *any* petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

N/A
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

_____
date

/s/ Paul L. Glover
PAUL L. GLOVER
Signature of Movant

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 95 CR 40
Hon. Judge William J. Hart

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

vs.

PAUL GLOVER,
Defendant/Petitioner.

Memorandum In Support of Section 2255 Motion To Correct Sentence

Now Comes Paul Glover. Hereafter "Petitioner", Pro Se, averring that the Sentencing Court misapplied the Sentencing Guidelines, when it failed to group all of the offenses. for which Petitioner was found guilty into a single group for sentencing purposes. In support of his 28 U.S.C. Section 2255 Motion to Correct his Sentence. Petitioner states as follows:

I. FACTS

A. *The Conviction*

Petitioner was convicted of multiple offenses arising from investments that he made on behalf of a Union's Pension and Health and Welfare Funds, and for which he, and others, obtained kickbacks. Specifically, Petitioner was found guilty of One Count of Conspiracy to Conduct Racketeering (18 U.S.C. 1962(d)), Eleven Counts of Soliciting and Receiving Kickbacks (18 U.S.C. 1954), Two counts of Money Laundering (18 U.S.C.1956) 1), and Four Counts of Income Tax Evasion (26 U.S.C.7206).

B. *The Presentence Investigation Report*

In preparation for Petitioner's Sentencing. the Probation Officer prepared a Presentence Investigation Report. In the Presentence Investigation Report. hereafter "the PSR". the Probation Officer states as follows:

1. "All of the conduct charged in Counts Two through Eighteen entails predicate acts of the Racketeering conspiracy charged in Count One" (PSR. Page 1).

2. "The Defendant and a Coconspirator. . . were involved in multiple criminal schemes throughout the time frame iterated above (March 1987 through January 1992), which primarily entailed the solicitation and acceptance of "Kickbacks" from various investments. utilizing union pension and health benefit funds. The Defendant... intended to take the proceeds of these illicit activities and convert them for personal use. To further perpetrate and avoid detection of these schemes. the Defendant laundered money and falsified his income tax returns." (PSR. Page 2).

3. ". . .The primary victims in this case were the (Union) members and beneficiaries of the pension and health and welfare funds who suffered the loss of actual funds. . . ." (PSR. Page 5).

4. The 1994 Edition of The Sentencing Guidelines Manual was used to compute the sentence. (PSR, Page 5).

5. The PSR grouped all the counts into a single count for sentencing purposes (PSR. Page 9-10).

C. *The Sentencing Hearing*

On 9/21/95 Petitioner was sentenced. Petitioner was represented by Attorney George Murtaugh, who, with Attorney Thomas Breen, represented Petitioner at trial.

The Government's position which had previously been submitted to the Court in a Position Paper concerning the grouping of the offenses was that the Money Laundering Offense should not be grouped with the other offenses because "there are separate victims with regard to the money laundering and the underlying offenses" (Sent. Trans. Page 4). The Government stated "the Seventh Circuit has not ruled on this issue." (Sent. Trans. Page 4).

The Court asked Attorney Murtaugh if he wanted to comment and he responded "No. your Honor. . . I think they are appropriately grouped." (Sent. Trans. Page 3-4). Petitioner's Attorney's offered no argument at sentencing against the Government's position or the Court's decision. Nor did Petitioner's Attorneys file a written Position Paper, in opposition to the Government's Position Paper, arguing that the offenses Petitioner was convicted of should constitute a single group.

The Court agreed with the Government's position, and grouped the Money Laundering separately from the other offenses (Sent. Trans. Page 4). Because there were now two groups of offenses Petitioner received a two level increase in his offense level (Sent. Trans. Page 15).

The Court then enhanced the Kickback Offense by two levels for Obstruction of Justice under Sec. 3 C1.1 of the Sentencing Guideline (Sent. Trans. Page 9).

Petitioner was sentenced to 84 months of incarceration (Sent. Trans. Page 24).

D. *The Appeal*

Petitioner appealed his sentence. The Attorneys for Petitioner in the Appeal were the same Attorneys that represented Petitioner at Trial and Sentencing.

The Issues presented on Appeal were:

1. Was the Petitioner denied a fair trial by the introduction of his incomplete testimony at a preceding trial? And

2. Did the District Court err by enhancing Petitioner's sentence for perjury at a prior trial of this case?

On December 2, 1996, the Appellate Court affirmed Petitioner's sentence (*U.S. v. Glover*, 101 F3d 1183. 1193 (7th Cir. 1996).)

II. ISSUES

Petitioner raises the following issues in his Sec. 2255 Motion:

A. Did the Sentencing Court misapply the Sentencing Guidelines. Sec. 3D1.2(b)-(d), when it revised the PSR by grouping the Money Laundering Offense separately from the other offenses?

B. Were Petitioner's Counsels ineffective at sentencing and on appeal. when they failed to argue that the grouping the Money Laundering Offense separately from the other offenses was a misapplication of Sec. 3D1.2(b)-(d)?

C. Was Petitioner significantly prejudiced by his Counsels's ineffective assistance. which resulted in his receiving a Two Level Increase in his Offense Level (an additional 15 months of incarceration) because of the inappropriate grouping of his offenses?

III. ARGUMENT

A. The Sentencing Court misapplied Sec. 3D.1.2 of the Sentencing Guidelines when it *Determined Not to Group the Money Laundering Offense with the Other Offenses.*

1. *Grouping Under The Sentencing Guidelines*

When a Defendant has been convicted of Multiple Counts the Sentencing Court shall group the counts pursuant to Sec. 3D1.2 (See Sec. 3D1.l). Section 3D1.2 provides that:

"All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to. the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved. or some other measure of aggregate harm. or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§ 2B1.1, 2B1.3, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§ 2C1.1, 2C1.2, 2C1.7;
§§ 2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§ 2E4.1, 2E5.1;
§§ 2F1.1, 2F1.2;
§ 2K2.1;
§§ 2L1.1, 2L2.1;
§ 2N3.1;
§ 2Q2.1;
§ 2R1.1;
§§ 2S1.1, 2S1.2, 2S1.3;
§§ 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1....

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection."

The Commentary to Sec. 3D 1.2 in the Sentencing Guidelines provides the following explanations:

"Application Notes:

1. Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping...

2. The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims... the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such

cases. the counts are grouped together when the societal interests that are harmed are closely related... Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph. i.e., to identify and group "counts involving substantially the same harm."

2. Under Sec.3D 1.2(a) Petitioner's Money Laundering Offense Was Properly Not Grouped With the Other Offenses.

Since Petitioner's offenses involved "two or more acts", it was a correct application of the Sentencing Guidelines not to group under Sec. 3D 1.2(a). However, even though Sec. 3D1.2(a) does not provide for grouping of Petitioner's offenses, it does not mean they can not be grouped under Sec.3D1.2(b),(c), or (d).

3. Under Sec.3D1.2(b) Petitioner's Money Laundering Offense Must Be Grouped With The Other Offenses.

Sec.3D1.2(b) requires grouping if the offenses "involve the same victim" and the criminal acts are "connected by a common criminal objective or constituting part of a common scheme or plan".

A Common Scheme/Plan is defined in the Commentary to Sec. 3D1.2(b) Application Note 9:

"(A) *Common scheme or plan*. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, *common accomplices*, *common purpose*, or similar *modus operandi*. "(emphasis added)

And as noted in the Introductory Comments to Part D: Third Paragraph: "Some offense that may be

charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range." Even if they constitute legally distinct offenses occurring at different times (Commentary, Application Note 4).

a. *The Money Laundering Offense And The Other Offenses Are Intertwined, Constitute a Common Scheme, and Have the Same Victim*

As set forth in the PSR. Page 2. "To further perpetrate and avoid detection of these schemes. the Defendant laundered money and falsified his income tax returns." Clearly, the Money Laundering Offense is so closely intertwined with the other offenses that they must be grouped together in one count.

Furthermore, the Money Laundering Offense and the other offenses "constitute a common scheme or plan" since they share a common victim (the benefit funds and their beneficiaries). common accomplices (Petitioner and Johnson) and common purpose (to get proceeds from the illicit activities and convert them for personal use, while avoiding detection) (See: *U.S. v. Bruder*, 945 F.2d 167. 170 (7th Cir. 1991), where the Court found that closely intertwined offenses should be grouped: *U.S. v. Bradach*, 949 F. 2d 1461. 1464 (7th Cir. 1991). where the Court grouped offenses under Sec. 3D 1.2(b), even though the harm was not the same, but the offenses involved the same victims and were part of a common scheme; *U.S. v. Griffth*, 85 F. 3d 284, 288 (7th Cir. 1996), where the Court grouped a RICO Conviction and a Money Laundering conviction because the offenses involved "substantially the same harm").

A case very similiar to Petitoner's case is *U.S. v. Cusumano*, 943 F. 2d 305 (3rd Cir. 1991). In *Cusumano* the Defendant was the administrator of a Union Health and Welfare Fund. He received kickbacks from service providers, in violation of 18 U.S.C. 1954. and then illegally laundering the kickbacks in violation of 18 U.S.C. 1956. The Court, citing § 3DI.2(b), found that the kickback offense and money laundering offense were properly grouped since "the victim of all offenses in this case was the Fund and its beneficiaries. The evidence demonstrated that the unlawful kickbacks . . . and the money laundering were all part of one overall scheme to obtain money from the fund and to convert it to the use of (Defendants)." (at 313).

The Seventh Circuit in *U.S. v. Wilson*, 98 F.3d 281 (7th Cir. 1996). following *Cusumano*, found that Money Laundering and Mail Fraud should be properly grouped since they constitute "closely related counts" under § 3D1.2 (at 283-284).

b. Conclusion

Based on the intent of Sec. 3D 1.2(b), and applicable case law, the Money Laundering Offense must be grouped with the other offenses, since they harm the same victim, are intertwined, and constitutes the same common scheme.

4. Under Sec. 3D1.2(c) Petitioner's Money Laundering Offense Must Be Grouped With the Other Offenses

Sec. 3D 1.2(c) requires Grouping "When one of the counts embodies conduct that is treated as a Specific Offense Characteristic In, or other adjustment to, the Guideline applicable to another of the counts."

Subsection (c) is explained in the Commentary to Sec. 3D1.2, Application Note 5:

> "Subsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. . . However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a)."

In Petitioner's PSR the Kickback Offense Base Offense Level was increased by two levels under Specific Offense Characteristics because "Defendant was the fiduciary of the benefit plan or labor organization" (PSR. Page 6), and another two levels under Adjustment of Obstruction of Justice under Sec. 3C1.l (Statement of Correction. Page 1). The Money Laundering Offense Base Offense Level was increased by two levels under Adjustments for Role in the Offense because "Defendant abused a position of trust... Defendant's fiduciary position within (the union). that enabled the Defendant to perpetrate this offense...", and another two levels under Adjustment for Obstruction of Justice under Sec.3C1.l (PSR. Page 7).

a. The Money Laundering Offense and the Other Offenses Share Specific Offense Characteristics and Adjustments, that Require Grouping.

The Money Laundering Offense embodies elements of Obstruction of Justice (*U.S. v. Maggi*, 44 F.3d 478, 481 (7th Cir. 1995)), therefore when the Court enhanced the other offenses by two levels for obstruction of justice it was required that the offenses be grouped together (see: *U.S. v. Connor*, 950 F. 2d 1267. 1276 (7th Cir. 1991)), where the Court stated in footnote 5. "If the Court adds two points for obstruction of justice (under 3C 1.1), the grouping of the offenses will change. "When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the Guideline applicable to another of the counts "the counts should be grouped together. U.S.S.G § 3D1.2(1990). The Commentary says that this rule applies to obstruction of justice adjustments. U.S.S.G §3D1.2. Comment, (n.5). and 3C1.1. Comment, (n.6), (citing *U.S. v. Hankins*, 931 F. 2d 1256. 1264 (8th Cir. 1991))"

This argument could be made only after the Sentencing Court had 1) decided not to group money laundering and the other offenses, and had 2) enhanced Petitioner, under Sec.3C1.l. under the other offenses. However, after the enhancement under Sec.3C 1.1 the issue of Grouping was not revisited.

Furthermore, under the Kickback Offense Petitioner was given a two level enhancement under Specific Offense Characteristics for being a fiduciary of the benefit plan or labor organization, and in the money laundering Petitioner was given a 2 level enhancement under adjustments for role in the offense, for abuse of a position of trust as a fiduciary of a labor organization. Thus,

the same type of conduct—violation of fiduciary obligations—resulted in petitioner being enhanced under both kickback and money laundering offenses ("Double Counting"). These enhancements connect the two offenses and require that they be grouped together under § 3D1.2(c) (See: *U.S. v. Haltom*, 113 F.3d 43.46 (5th Cir. 1997)), where (Defendant) contends that the conduct underlying his mail fraud conviction resulted in an enhanced offense level for tax evasion, and that therefore the counts should have been grouped. . . (Defendant's) offense level for tax evasion was increased by two because of his unreported income was derived from criminal activity, *i.e.*, the mail fraud alleged in count one. It is therefore indisputable that the mail fraud count "embodies conduct that is treated as a specific offense characteristic "of the tax evasion counts. . . (Defendant's) mail fraud and tax evasion convictions can not readily be said to have caused "substantially the same harm" (mail fraud-damage to private individuals: tax offense-harm to government). "Absent a contrary directive in the guidelines themselves, we might have considered these harms quite distinct and concluded (Defendant's) offenses were not groupable. However, we are bound by the text of the applicable guideline (§ 3D1.2(c)). This definition removes any doubt (Defendant's) offenses must be grouped.")

b. *Conclusion*

Pursuant to the intent of (§ 3D1.2(c)), and applicable case law, the Money Laundering Offense must be grouped with the other offenses, since the Obstruction of Justice enhancement, and the "Double Counting" caused by the same type of

conduct in the Money Laundering Offense and the other Offenses, dictates a single grouping of offenses.

5. Under Sec. 3D1.2(d) Petitioner's Money Laundering Offense Must Be Grouped With The Other Offenses.

Sec.3D1.2(d) requires Grouping "when the offense level is determined largely on the basis of the total amount of harm or loss. . . or some other measure of aggregate harm. or if the offense behavior is ongoing. . . and the offense guideline is written to cover such behavior." The offenses specifically included for grouping under § 3Dl.2(d) are then listed. (See Section III. A. 1. Above).

Subsection (d) is explained in the Commentary to Sec. 3D12. Application Note 6:

"Subsection (d) likely will be used with the greatest frequency. It proves that most property crimes and other crimes where the guidelines are based primarily on quantity . . . are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection(d)."

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitations covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the

criteria for grouping under this subsection. The same general type "of offense is to be construed broadly, and would include, for example larceny, embezzlement, forger, and fraud.

a. All of Petitioner's Offenses Are Specifically Included for Grouping Under Sec. 3DL2(d)

1. Petitioner's kickback offense, under 18 U.S.C. 1954, is calculated on Page 6 of his PSR. The Racketeering Conspiracy Offense, under 18 U.S.C. 1962, is determined by the predicate acts—the kickbacks. The determination as to the adjusted Offense Level is accomplished under U.S.S.G. 2E5.1, using 2F1.1 Tables, which, based on the aggregated amount of the total commissions paid, (more than 1.5, but less than 2.5 million) increased Petitioner's Offense Level by 12. Both 2E5.1 and 2F1.1 are listed offenses that are to be grouped under Sec. 3D 1.2(d).

2. Petitioner's Money Laundering Offense, Level (PSR Page 7), is determined under U.S.S.G. 2S1.1. Section 2S1.1 is a listed offense, that is to be grouped under § 3D1.2(d).

3. Petitioner's fraudulent income tax return offense level (PSR Page 9) is determined under U.S.S.G. 2T1.1 and 2T4.1. Sections 2T1.1 and 2T4.1 are listed offenses that are to be grouped under §3D1.2(d).

4. Therefore, all of the offenses, which determined the offense level for Petitioner's sentencing, are specifically included

for grouping purposes under § 3D1.2(d) and should be grouped together. *U.S. v. Bruder*, 945 F.2d 167, 170 (7th Cir. 1991) (In accord: *U.S. v. Tai*, 994 F. 2d 1204, 1213 (7th Cir. 1993). where the Court discussed § 3D1.2(d), noting "mercifully, the guideline lists the specific offenses to which it does not apply."; *U.S. v. Sykes*, 7 F. 3d 1331. 1336 (7th Cir. 1993); *U.S. v. Morgano*, 39 F. 3d 1358. 1379 (7th Cir. 1994); *U.S. v. Brown*, 31 F. 3d 484. 494 (7th Cir. 1994), where, in footnote 15, the Court found ". . . the district court correctly grouped the conviction counts (fraud and money laundering) together. . . See U.S.S.G. Sec. 3D 1.2(d), 2S1.1(c).").

b. All of the Petitioner's Offenses Are of the Same General Type, as Required By Sec. 3D1.2 (d) for Grouping

As set forth in the Commentary. Application Note 6 "The 'same general type' of offense is to be construed broadly" for grouping under Sec.3D1.2(d). Money Laundering and the other offenses are of the "same general type" to be grouped together under Sec.3D1.2(d). (See: *U.S. v. Brown*, supra.; *U.S. v. Adams*, 74 F.3d 1093. 1102 (11th Cir. 1996), where the Court found in Footnote 12. "Fraud and Money Laundering convictions, however, can be grouped under U.S.S.G. §3D1.2(d). *U.S. v. Mullens*, 65 F.3d 1560 (11th Cir. 1995)").

In *U.S. v. Wilson*, 98 F.3d 281, 283 (7th Cir. 1996). the Court grouped Mail Fraud (2F1.1) and Money Laundering (2S1.1) under Sec.

3D1.2(d), because the offenses were listed under Sec. 3D1.2(d) and satisfied the standard set forth in Application Note 6. The Court stated: "Broadly speaking, they are 'of the same general type,' and the offense level for each 'is determined largely on the basis of the total amount of harm or loss' as subsection (d) envisions. . . we reject the government's contention that these offenses are inappropriate for grouping because they involved different victims and thus different harms." *Footnote 3*. Note 6 explains that "[T]he 'same general type' of offense is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud."(at 283).

c. *Conclusion*

Based on the intent of Sec. 3D1.2(d), and applicable case law, the Money Laundering Offense must be grouped with the other offenses, since they are specifically included for grouping. and are of the same general type.

B. *Petitioner's Counsel was Ineffective at Petitioner's Sentencing and On Appeal*

1. *The Standard For Determining That Counsel Was Ineffective*

The Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052. 80 L.Ed.2d 674(1984), established the standard by which the performance of Counsel will be judged to determine if Counsel was ineffective in representing a Defendant.

The Seventh Circuit has analyzed the *Strickland* Standard as follows:

> A defendant ". . . must show (1) that the attorney's representation fell below an objective standard of reasonableness (performance prong), *Strickland v. Washington*, 466 U.S. 668. 688. 104 S. Ct. 2052, 2005, 80 L.Ed. 2d 674 (1984), and (2) that there exists a reasonable probability that, but for counsel's unprofessional errors. the result of the proceedings would have been different (prejudice prong). id. At 694. 104 S. Ct. At 2068. See also *U.S. ex Rel. Barnard v. Lane*. 819 F. 2d 798. 802 (7th Cir. 1987); *U.S. v. Hiflsberg*. 812 F.2d 328. 336 (7th Cir.). cert denied. 481 U.S. 1041. 107 S. Ct. 1980. 95 L. Ed. 2d 821 (1987)). With regard to the performance prong, the defendant must identify the specific acts or omissions of counsel that formed the basis for this claim of ineffective assistance. *Strickland*. 466 U.S. at 690, 104 S. Ct. at 2066. The Court 'must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' I . . . as to the prejudice prong of the inquiry a 'reasonable probability' of a different result means a 'probability sufficient to undermine confidence in the outcome [of the trial].' *Strickland*. 466 U.S. at 694, 104 S. Ct. at 2068." (*U.S. v. Delgado*, 936 F.2d 303, 310 (7th Cir. 1991); *Patel v. U.S.*, 19 F. 3d 1231, 1235 (7th Cir. 1994)).

2. The Strickland Standard Applies To Sentencing

The Seventh Circuit has ruled that the *Strickland* Standard, requires the defendant's counsel to render effective representation, at the sentencing phase of the trial. (See:

U.S. V. Delgado. 936 F. 2d 303. 310 (7th Cir. 1991), citing *U.S. v. Slaughter*. 900 F. 2d 1119. 1124-25 (7th Cir. 1990); *Ebbole v. U.S.* 8 F.3d 530. 533 (7th Cir. 1993)).

3. The Issue of Ineffective Counsel is Properly Raised in a Section 2255 Motion

As decided in *Guinan v. U.S.*. 6 F.3d 468 (7th Cir. 1993), the issue of ineffective assistance is properly raised at the collateral stage (i.e. a Section 2255 Motion). rather than on direct appeal, if defendant has a valid reason for postponing the raising of the ineffective assistance claim (Id. at 472). And "If (Defendant) was represented on appeal by the very lawyer who he now claims did not represent him effectively at trial, then he could not, as a practical matter, have raised the ineffective assistance claim on direct appeal, so there is no forfeiture." (Id. at 471. citing *Velarde v. U.S.* 972 F.2d 826. 827 (7th Cir. 1992): also: *Degaglia v. U.S.*, 7 F. 3d 609. 611 (7th Cir. 1993); *Amhrizv. U.S.* 14 F. 3d 331, 333 (7th Cir. 1994)).

Accordingly, since Petitioner was represented by the same attorneys at trial, sentencing, and direct appeal, he may raise the issue of ineffective assistance of counsel in this Section 2255 Motion.

4. The Specific Omission of Petitioner's Counsels' that Establish Counsels Ineffectiveness

As set forth in B.1. above, Petitioner "must identify the specific acts or omissions of counsel" that form the basis for his claim of ineffective assistance (*U.S. v. Delgado*, 936 F. 2d 303, 310 (7th Cir. 1991); *U.S. v. Johnson-Wilder*. 29 F. 3d. 1100, 1104 (7th Cir. 1994); *Velarde v. U.S.* 972 F.2d 826, 829 (7th Cir. 1992)).

Accordingly, Petitioner sets forth the following specific omissions by his trial counsels, at sentencing, that form the basis of his claim of ineffective assistance of counsel:

c) Prior to the sentencing hearing, Petitioner's Counsels received the Governments position paper in opposite to sentencing in the PSR. The grouping of the multiple counts into a single group for sentencing purposes was one of the three areas opposed by the Government in its position paper.

Petitioner's Counsels did not prepare any written response to the Government's position paper in opposition to the PSR. As set forth in III.A. above, such a presentation of evidence would have been persuasive, and therefore, Petitioner's Counsels were ineffective for not having prepared, and presented to the Sentencing Court, a written response to the Government's position paper, setting forth the arguments that the PSR was correct in grouping all the counts into one group for sentencing purposes under Section 3D of the Sentencing Guidelines. And pointing out the Seventh Circuit cases which supported grouping (See III.A. above), that the Government stated did not exist. (See : *U.S. exRel. Cross v. DeRobertis*. 811 F. 2d 1008. 1015 (7th Cir. 1987).

d) Only one of Petitioner's Counsels participated in the sentencing proceeding. Attorney Breen did not arrive in Court until after the sentencing Court had determined the outcome of the grouping issue. Therefore, Petitioner was deprived of Attorney's Breen's representation at sentencing by his absence.

e) Attorney Murtaugh was present for the entire sentencing proceeding. His failure to effectively

represent Petitioner, when the issue of grouping was presented to the sentencing court by the Government is apparent from the transcript of the sentencing hearing: when the Sentencing Court asked Attorney Murtaugh if he wanted to comment on the grouping issue, he merely responded "No . . . I think they are appropriately grouped." (Sent. Trans. Page 3-4). Attorney Murtaugh made no attempt to present any argument in opposition to the arguments presented by the Government concerning the grouping of the counts in the PSR. He presented no case law in opposition to the Government's position. even though, as set forth in III.A. above, such case law in support of the grouping as set forth in the PSR existed and was persuasive. Attorney Murtaugh's failure to represent Petitioner effectively at the sentencing Petitioner to receive a two level enhancement. The Guidelines and relevant case law make it clear that such an enhancement is not permitted. (See: *Barker v. U.S.*. 7 F.3d 629, 635) 7th Cir. 1993): *U.S. v. Baldwin*, 1956 F. 2d 643. 645-646) 7th Cir. 1992); *U.S. v. Ford*. 918 F. 2d 1343. 1350(8th Cir. 1990)).

f) Petitioner's Counsels did not raise the issue of the grouping in Petitioner's Appeal to the Seventh Circuit Court of Appeals. Raising this issue on appeal and arguing that the counts were not properly grouped, would have resulted in the two level enhancement Petitioner received being overturned by the Appellate Court. Petitioner's Counsels failure to directly appeal the Sentencing Court's improper enhancement of Petitioner's sentence constitutes ineffective assistance of counsel. (See: *Hollenback v. U.S.*, 987 F. 2d 1272. 1275) 7th Cir. 1993).

5. Conclusion

It is apparent from the Sentencing transcript, and the fact that no written response to the Government's position paper, was submitted, that Petitioner's Counsels had not prepared to represent Petitioner at his sentencing. In *U.S. v. Jackson*, 935 F.2d 832. 845 (7th Cir.1991), the Court stated that "[e]ffective representation of a criminal Defendant requires pretrial preparation and investigation." The same "preparation" is required at a defendant's sentencing, otherwise a defendant may be subject to inappropriate enhancements. Attorneys are expected to be familiar with the Sentencing Guidelines and know whether the sentence being administered under those Guidelines is correct. (See: *U.S. v. Day*, 969 F. 2d 39. 43)(3rd Cir. 1992)).

Petitioner's Counsels were clearly not familiar with Section 3D of the Guidelines. They had not adequately investigated those guidelines, nor had they adequately prepared to argue that the PSR's position on grouping the charges was correct, and that the Government's position, that the convictions should be separately grouped, was incorrect. Thus, Petitioner was without effective representation at sentencing. When Petitioner's Counsels failed to appeal his two level grouping enhancement they failed to effectively represent him on appeal.

C. Petitioner Was Prejudiced By His Counsels' Ineffectiveness

1. The Standard For Determining That Petitioner was Prejudiced By The Ineffectiveness Of Counsel

As set forth in B.l., above, pursuant to *Strickland v. Washington*, supra, for a defendant to prevail on

an ineffective counsel claim he must show counsel's performance was deficient *and* he was prejudiced thereby. Prejudice is defined as a reasonable probability that, but for counsel's unprofessional errors the result of the proceedings would have been different.(*Strickland* at 2068). (See: *U.S. v. Johnson-Wilder*, 27 F.3d. 1100. 1104(7th Cir. 1994).

2. The Prejudice

It is clear that Petitioner was prejudiced by his Counsels ineffectiveness at the sentencing hearing and on appeal. Petitioner's Counsels' failure to show the Sentencing Court that the grouping of the charges, as set forth in the PSR, was the correct application of the guidelines, and, correspondingly, that the Government's position was incorrect, caused the Sentencing Court to enhance Petitioner's sentence two levels–from offense level 26 to offense level 28. This two level enhancement resulted in Petitioner being given an additional fifteen months of incarceration.

As is set forth in III.A. above, the two point enhancement was an inappropriate application of the Sentencing Guidelines. Therefore, Petitioner was prejudiced, when, due to his Counsels' ineffectiveness at sentencing he was inappropriately sentenced to an additional fifteen months of incarceration.

If Petitioner's Counsels had appealed this improper application of the Sentencing Guidelines, the Appellate Court would have overturned the two point enhancement, thereby reducing Petitioner's sentence by fifteen months.

Since this fifteen month represents a significant increase in Petitioner's sentence (12%) Petitioner has established the prerequisite prejudice necessary to meet the second prong of the *Strickland* Test (*Durrive v. U.S.*, 4 F.3d 548. 551 (7th Cir 1993).

IV. CONCLUSION

Based on the above recitation of facts and law, Petitioner's Section 2255 Motion should be granted. Thereafter, Petitioner should be properly sentenced under Part 3D of the Sentencing Guidelines, with all counts being grouped in a single count, and Petitioner's offense level established at 26.

Respectfully submitted.

/s/ Paul Glover
PAUL GLOVER, PRO SE
06488-424
P.O. Box 1000
Marion, IL 62959

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 8382
No. (95 CR 40)

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL L. GLOVER,

Defendant,

MEMORANDUM OPINION AND ORDER

Following a jury trial, defendant Paul Glover was found guilty of one count of a conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d); 11 counts of soliciting and receiving kickbacks in violation of 18 U.S.C. § 1954; two counts of money laundering in violation of 18 U.S.C. § 1956(a) (1) (B) (i); and four counts of tax evasion in violation of 26 U.S.C. § 7206. He was sentenced to concurrent terms of incarceration with the longest term being 84 months. The term of incarceration is to be followed by three years' supervised release. Additionally, Glover was required to forfeit $325,000. Glover's conviction and sentence were affirmed on direct appeal, where he was represented by the same counsel who represented him at trial. *See United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996). Less than one year after the decision on appeal became final, Glover filed his present motion pursuant to 28 U.S.C. § 2255.

Glover presently contends that his guideline sentencing range was incorrectly calculated in that his money laundering offenses should have been grouped with his conspiracy and kickback offenses. See U.S.S.G. § 3D1.2. He further contends that his counsel were ineffective for failing to adequately raise this issue at the time of sentencing and for failing to raise the issue at all on direct appeal. At the time of sentencing, it was determined that Glover's total offense level was 28 and his criminal history category was I for a guideline range of 78 to 97 months. He was sentenced to 84 months' incarceration. Had the money laundering been grouped with the conspiracy and kickback offenses, the total offense level would have been 26 and the guideline range would have been 63 to 78 months.[1] Glover's sentence would have had to have been reduced by at least 6 months and possibly up to 21 months, though it is unlikely that he would have been sentenced to the low end of the 63-78 month range since he was not sentenced on the low end of the 78-97 month range.[2]

At the time plaintiff was sentenced, the Seventh Circuit had not yet considered the particular grouping issue that Glover

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[1] The government contends that reducing the newly grouped offense level to 26 would require that an additional level be added based on the separately grouped tax offenses being within 8 points of the 26 offense level. See U.S.S.G. § 3D1.4(b). However, the tax offenses had an offense level of 16, not the 18 referred to in the government's brief. Perhaps the government was adding two points for obstruction of justice, but the probation officer did not recommend such an adjustment for the tax offenses and no finding to that effect was made. Since the tax offenses would be 10 levels lower than the other group, no adjustment would be made. *See id* § 3D1.4(c)

[2] The tax offenses could have been a basis for not sentencing on the low end See U.S.S.G. § 3D1.4(c).

now attempts to raise. Other circuits had held that separate grouping was required. *See, e.g., United States v. Lombardi*, 5 F.3d 568, 570-71 (1st Cir. 1993) (grouping money laundering separate from conspiracy/mail fraud); *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993) (grouping money laundering separate from wire fraud); *United States v. Smith*, 13 F.3d 1421, 1428 (10th Cir.), *cert. denied*, 513 U.S. 878 (1994) (grouping money laundering separate from mail fraud). In *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996), the Seventh Circuit held that the § 1956 money laundering offenses and mail fraud offenses involved in that case should be grouped. The government apparently concedes that *Wilson* would be controlling as to the grouping of Glover's conspiracy, kickback, and money laundering offenses. Glover was sentenced on September 21, 1995, his appeal was argued September 13, 1996, and the decision on appeal was issued December 2, 1996. *Wilson* was argued April 1, 1996 and issued October 17, 1996.

To succeed on an ineffective assistance of counsel claim, it must be shown both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Melvin v. United States*, 78 F.3d 327, 329 (7th Cir.), *cert. denied*, 117 S. Ct. 384 (1996). The government contends that counsel's performance could not have been deficient, at sentencing or on appeal, for failing to raise an issue that had not yet been decided by the Seventh Circuit.[3] Glover disagrees, arguing that other case law that predated the

[3] The government also contends that counsel adequately argued the issue at sentencing. As discussed below, none of the deficiency of performance issues need be resolved. Additionally, the adequacy of trial performance issue need not be resolved because, even if the grouping issue was adequately argued at sentencing, there is no dispute that it was not raised at all on appeal.

sentencing made it clear that this was a viable issue that should have been raised by effective counsel. The government also contends that Glover cannot satisfy the prejudice component of an ineffective assistance of counsel claim because the potential effect on his sentence is not significant enough to satisfy the prejudice requirement. Because it is held that Glover does not satisfy the prejudice requirement, it is unnecessary to consider the issue of deficient performance. *See Melvin*, 78 F.3d at 329.

Claimed errors in guideline calculations generally are not cognizable on a § 2255 motion. *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996), *cert. denied*, 118 S. Ct. 335 (1997); *Durrive v. United States*, 4 F.3d 548, 549-51 (7th Cir. 1993); *Scott v. United States*, 997 F.3d 340 (7th Cir. 1993). When, as here, the constitutional basis for relief on such a claim is ineffective assistance of counsel, the potential change of sentence must be a "significant" amount in order to satisfy the prejudice prong of an ineffective assistance of counsel claim. *Martin*, 109 F.3d at 1178; *Durrive*, 4 F.3d at 551. *Durrive* involved a maximum reduction of two offense levels with a possible reduction of sentence from 120 months' incarceration to somewhere between 98 and 108 months.[4] The Seventh Circuit held this was not a significant change that would satisfy the prejudice requirement. In *Martin*, the dispute involved a change of one criminal history category, which is equivalent to two offense levels. The effect in terms of length of incarceration was not specified.[5] The Seventh

[4] The low end of the guideline range would have been 87 months, but the Seventh Circuit assumed the sentencing judge would not have gone below the middle of the guideline range.

[5] Martin's original sentence was 137 months. *See United States v. Martin*, 964 F.2d 714, 716 (7th Cir. 1992); *United States v. Martin*, 1995 WL 124126 *4 (N.D. Ill. March 20, 1995)

Circuit appeared to state a *per se* rule that a change of two offense levels would not satisfy the significant change requirement. *Martin*, 109 F.3d at 1178. *See also United States v. Hubbard*, 1997 WL 639232 *4 (N.D. Ill. Oct. 6, 1997); *Gonzalez v. United States*, 967 F. Supp. 326, 332 (N.D. Ill. 1997).

The Seventh Circuit has not directly addressed the question of how much time would actually be enough to satisfy the significant change requirement. In *Martin*, 109 F.3d at 1178, the court states: "Although we recognized in *Durrive* that any extra time in prison is significant from the defendant's perspective, we adopted a rule of proportionality: the sort of increase produced by a few levels' difference in sentencing calculations cannot be raised indirectly on collateral attack by complaining about counsel's work." This implies that a change of more than a few levels can be significant. But even taking that implication as authoritative, "few" is not a precise term and the Seventh Circuit does not indicate how the difference in length of sentence should be considered. And by referring to proportionality, the Seventh Circuit may be indicating that the percentage change in sentence is also to be considered—a one-year increase doubling a one-year sentence may be considered significant even if a one-year increase to a 30-year sentence is not.

The present case arguably involves a potential change in sentence that is slightly larger (proportionally) than that involved in *Durrive*. *Durrive* involved an offense level change from 30 to 28[6] and a sentence reduction of 10 to 18.3

[6] *United States v. Durrive*, 902 F.2d 1221, 1231 n.8 (7th Cir. 1990), indicates that *Durrive's* total offense level was 30 (28 plus a two-level enhancement). With a criminal history category of II, a two-level change would have changed his guideline range from 108-135 to 87-108, the ranges referred to in *Durrive*, 4 F.3d at 549, 551.

per cent.[7] The present case involves an offense level change from 28 to 26 and a sentence reduction of 7.1 to 25 per cent.[8] The potential sentence reduction in the present case is not large enough to satisfy the significant change requirement of *Durrive* and *Martin* and other cases have so held as to proportionally larger changes. See *Unger v. United States*,— F. Supp. 2d ___, 1998 WL 337476 *3 (E.D. Wis. June 22, 1998) (reduction in total offense level from 28 to 24); *Davis v. United States*, 1998 WL 142369 *3 (N.D. Ill. March 19, 1998) (two-level reduction changing the sentence of incarceration from 51 months to 37 months). Because the error claimed in the present case did not have a significant effect on Glover's sentence, he does not state any basis for granting § 2255 relief.

IT IS THEREFORE ORDERED that defendant's motion to vacate sentence [1] is denied. The Clerk of the Court is directed to enter judgment in favor of the government and against defendant denying the § 2255 motion. If defendant wishes to appeal this order, he must file a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit with the Clerk of the Court, United States District Court for the Northern District of Illinois, 219 South Dearborn Street, 20th Floor, Chicago, Illinois 60604, within sixty (60) days of the entry of the judgment in this case. Any notice of appeal should be accompanied by a request for a certificate of appealability, including a statement as to why a certificate

[7] 120 months reduced by 12 to 22 months.

[8] 84 months reduced by 6 to 21 months. However, if like *Durrive*, it is not assumed that the potential reduction is to the low end, but instead is to 6 above the low end as was the original sentence, then the maximum reduction is to 69, for a percentage change of 17.9 per cent (15/84).

should issue. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); 7th Cir. R. 22.1.

ENTER:
/s/ Illegible
United States District Judge

Dated: SEPTEMBER 3, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 98-4021

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.

PAUL L. GLOVER,
Petitioner-Appellant.

Appeal from the United States District Court,
Northern District of Illinois, Eastern Division

No. 97-C-8382
Judge William T. Hart

BRIEF AND APPENDIX OF PETITIONER-APPELLANT PAUL L. GLOVER

Paul L. Glover
Petitioner-Appellant, Pro Se
#06488-424
P.O. Box 1000
Marion, Ill. 62959

ARGUMENT

I.

THE PREJUDICE REQUIRED IN A SECTION 2255 MOTION

A. THE DISTRICT COURT ERRED WHEN IT DISMISSED APPELLANT'S SECTION 2255 MOTION

Appellant contends in his Section 2255 Motion that his attorneys were ineffective when 1) they failed to argue at his sentencing that all the Counts should be placed in one Group, under Section 3D1.2(d) of the Guidelines, as: recommended by the Presentence investigation Report, and when 2) they failed to argue on direct appeal that Appellant had been incorrectly enhanced under Section 3D1.4 (Multiple Counts) of the Guidelines when the Sentencing Court grouped the Morey Laundering Count separately from the other Counts. Appellant then contends that his attorneys' ineffectiveness at sentencing and on direct appeal prejudiced him because if they had argued the Grouping Issue at sentencing under existing case law, and/or had raised the issue of the incorrect enhancement on direct appeal, Appellant's sentence would have been reduced by two Offense Levels, an up to 25 per cent reduction, under this Court's ruling in *Wilson v. United States*, 98 F.3d 281 (7th Cir. 1996). While the District Court noted that "The Government apparently concedes that *Wilson* would be controlling as to the grouping of (Appellant's) conspiracy, kickback, and money laundering offenses." (Appendix, Page 5a), it denied Appellant's Section 2255 Motion without considering the issue of the ineffectiveness of Appellant's attorneys. The District Court found that Appellant did not meet the "significant" prejudice rule of *Durrive v. U.S.*, supra, and *Martin v. U.S.*, supra, even though his sentence had been incorrectly enhanced two Offense Levels, which potentially increased his sentence by up to 25 per cent. As shown hereafter, Appellant does meet the

prejudice standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), and is an exception to the "significant" prejudice rule of *Durrive* and *Martin*. Accordingly, the District Court erred when it dismissed Appellant's Section 2255 Motion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted June 23, 1999*
Decided July 15, 1999

Before

Hon. DANIEL A. MANTON, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

No. 98-4021

PAUL L. GLOVER.
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 97 C 8382
William T. Hart
Judge.

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a) (2).

ORDER

Paul Glover was convicted of conspiracy, soliciting and receiving kickbacks, money laundering, and tax evasion, and was sentenced to 84 months in prison. He filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, on the ground that his lawyers were ineffective in failing to argue that the sentencing court should have grouped his money laundering offenses with his conspiracy and kickback offenses under U.S.S.G. § 3D1.2. The district court denied his motion, and we affirm.

In order to successfully claim ineffective assistance of counsel, Glover would need to show that his counsel performed below a constitutional threshold and that the deficient performance prejudiced him. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). Even if we were to assume that Glover's attorneys performed inadequately, the second prong, prejudice, is missing here. Glover argues that his attorneys' failure to argue the correct interpretation of U.S.S.G. § 3D1.2 led to an adjusted offense level two levels higher than it should have been. This court has held that only a significant increase in the sentence rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack. *Allen v. United States,* No. 97-3329, 1999 WL 243623 (7th Cir. Apr. 27, 1999); *Martin v. United States,* 109 F3d 1177, 1178 (7th Cir. 1996); *Durrive v. United States,* 4 F3d 548, 551 (7th Cir. 1993).

At sentencing, the district court determined that Glover's adjusted offense level under the Sentencing Guidelines was 28 and his criminal history category was I, resulting in a sentencing range of 78 to 97 months in prison. The court selected a midpoint in the range, sentencing Glover to 84 months in prison. Glover alleges that, but for the errors of his counsel, his adjusted offense level would have been 26, resulting in a range of 63-78 months imprisonment. Thus, he

argues, his sentence would have been 6 to 21 months lower than the 84-month sentence he received. Unfortunately for Glover, under *Martin* and *Durrive*, this potential decrease is not sufficiently significant to be cognizable on collateral attack.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Before

Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

October 7, 1999

No. 98-4021

PAUL L. GLOVER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division.

No. 97 C 8382

William T. Hart, Judge

ORDER

Petitioner-appellant filed a petition for rehearing and petition for rehearing en banc. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

PRESENTENCE INVESTIGATION REPORT
Docket No. 95 CR 40-1

UNITED STATES OF AMERICA

vs.

GLOVER, PAUL L.

Prepared For: Honorable William T. Hart
United States *District* Court Judge

Prepared By: Elisa J. Ehrlich
United States Probation Officer
Chicago, Illinois
(312) 435-7629

Assistant U. S. Attorney	Defense Counsel
Stephen Anderson	Thomas Breen
219 South Dearborn	Attorney at Law
5th Floor	53 West Jackson
Chicago, Illinois 60604	Suite 1460
	Chicago, Illinois 60604
	(312) 360-1001

Sentence Date: September 21, 1995, at 1:30 p.m.

Offense: Count One: Conspiracy to Conduct Racketeering Influenced and Corrupt Organizations; (18 USC Section 1962(d)); $250,000 Fine and/or 20 Years Imprisonment, Three Years Supervised Release, $50 Special Assessment

Counts Two, Three, Four, Eight, Nine, Ten, 14, 15, 16, 17, 18: Offer, Accept, or Solicitate to Influence Operations of Employee Benefit Plan; (18 USC Section 1954); $250,000

Fine and/or Three Years Imprisonment, One Year' Supervised Release, $50 Special Assessment

Counts Five & Six: Money Laundering (18 USC 1956(a)(1)(B)(i)); $500,000 and/or 20 Years, Three Years Supervised Release, $50 Special Assessment: Per Count

Counts 19, 20, 21, 22: Fraudulent Income Tax Returns; (26 USC Section 7206(1)); $250,000 Fine and/or Three Years Imprisonment, One Year Supervised Release, Costs of Prosecution, $50 Special Assessment

Release Status:	$4,500 Personal Recognizance Bond (Non Supervision Status)
Detainers:	None
Codefendants:	None
Related Cases:	BENNETT, Susan: 93 CR 133-1. Pled guilty to Count One on March 5, 1993. Sentencing date scheduled for September 13, 1995, Judge Gottschall
	JOHNSON, John R. Sr.: 94 CR 255-1. Pled guilty to Counts One and 13 through 15 on July 21, 1994. Sentencing date scheduled for August 29, 1995, Judge Leinenweber.

Date Report-Prepared: 8/14/95 Date Report Revised:

Identifying Data:

Date of Birth:	7/9/47
Age:	48
Race:	White
Sex:	Male

SSN No:	303-54-2473
FBI No:	49485XA2
USM No:	06488-424
Other ID No:	None
Education:	Post Graduate Degree
Dependents:	Three (Two Children & Spouse)
Citizenship:	U.S. Citizen
Legal Address:	4916 Saratoga Dowers Grove, Illinois 60515
Aliases:	None

GLOVER, Paul L.
Docket No. 95 CR 40-1.

PART A. THE OFFENSE

Charge(s) and Conviction(s)

Indictment No. 95 CR 40 is a 22-count criminal matter filed in the Northern District of Illinois on January 19, 1995, against the defendant. The offense behavior charged in Indictment No. 95 CR 40 involved racketeering conspiracy; in violation of Title 18, United State-Code, Section 1962(d); offering, accepting or soliciting to influence operations of employee benefit plan; in violation of Title 18, United States Code, Section 1954; money laundering; in violation of Title 18, United States Code, Section 1956(a) (1) (B) (I); tampering with a witness; in violation of Title 18, United States Code, Section 1512(b) (1); and filing fraudulent income tax returns; in violation of Title 26, United States Code, Section 7206(1)

The racketeering conspiracy is set forth in Count One and Consists of six individual racketeering activities. Racketeering Acts One through Three and Six entail offering, accepting or soliciting to influence operations of employee benefit plan offenses (accepting "kickbacks"). This charge is also alleged in Counts Two through Four and Eight through 18. The money laundering activities are outlined in Racketeering Act Four of Count One and Counts Five and Six. Tampering with a witness is charged in Racketeering Act Five of Count One and Count Seven. The defendant was acquitted of Count Seven. Finally, the filing of fraudulent income tax returns is alleged in Counts 19 through 22. All of the conduct charged in Counts Two through 18 entails predicate acts of the racketeering conspiracy charged in Count One.

The defendant was also charged in a count seeking forfeiture of the proceeds of the racketeering activities. The count charged that the defendant acquired and obtained revenue of

approximately $338,325, which was derived from the proceeds of the racketeering activities described below. This count is in violation of Title 18, United States Code, Section 1963(a) (1) and (3) and Section 1963(a) (2) (A) and (D). A special verdict by the Court regarding the forfeiture allegations indicated that a total of $325,000 should be forfeited by the defendant to the United States.

The defendant was tried twice in connection with this case and testified in only the first trial. His original trial which occurred from approximately April 17, 1995 to May 2, 1995, ended in a mistrial. The defendant underwent a second jury trial which ran from June 5, 1995 to June 22, 1995. On June 22, 1995, the defendant appeared before the Honorable William T. Hart and was found guilty of Counts One through Six, Eight through Ten, and 14 through 22 of the indictment. The defendant was released on a $4,500 own recognizance bond, non-reporting status. The defendant is scheduled to be sentenced on September 21, 1995, at 1:30 p.m.

The Offense Conduct

Assistant United States Attorney Stephen Anderson submitted a statement of facts, which is attached to this report and is summarized below.

Beginning in or about approximately March 1987 and continuing until approximately January 1992, the defendant was the General Counsel and Vice President of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (hereinafter "CTDU"); Employee Trustee and Fund Manager of the CTDU Health and Welfare Plan and Employee Trustee of the CTDU Pension Fund, all elected positions. In holding these titles, the defendant occupied a position of trust in which he was to act as a fiduciary in the best interests of the CTDU by managing its funds. The defendant and a coconspirator, John R. Johnson Sr., were involved in multiple criminal schemes throughout the time frame iterated above

which primarily entailed the solicitation and acceptance of "kickbacks" from various investments utilizing union pension and health benefit funds. The defendant and Johnson intended to take the proceeds of these illicit activities and convert them for personal use. To further perpetrate and avoid detection of these schemes, the defendant laundered money and falsified his income tax returns. A brief synopsis of what transpired, which incorporates the individual racketeering activities, will be iterated here.

In Racketeering Act One, which occurred during March 1987 through about July 1987, the defendant and Johnson purchased approximately 168,549 shares in Coalstar Enterprises/Omega Gold for $1,011,294, without notifying or acquiring consent from the Employer Trustees. Kickback payments totalling approximately $135,000 were received and split evenly by the defendant and Johnson (thus, the defendant's share was approximately $67,500). The defendant continued to conceal this investment from the Pension Fund Board of Trustees during quarterly meetings. Additionally, the defendant did not report this income on his 1987 income tax return.

As alleged in Racketeering Act Two, beginning in approximately March 1987 and continuing through April 1987, the defendant and Johnson received kickback payments from investments with Kemper Investment Portfolios/ Government Investment Portfolios and Putnam funds through a stock broker, Susan Bennett. The defendant and Johnson invested approximately $6,550,000 from the Health and Welfare Fund of CTDU without the authority or consent of the Employee Trustees. The defendant's share of the kickback payment on this investment was approximately $15,000, which the defendant failed to report on his 1987 income tax returns.

Sometime in 1989, the CTDU Pension Fund Board of Trustees began to consider investing in real estate funds. The

defendant and Johnson solicited a broker, Susan Bennett, to present several real estate packages to the CTDU Pension Fund Trustees. The use of broker on this particular investment was not required but was utilized anyway by the-defendant and Johnson. The CTDU Pension Fund ultimately invested $10,000,000 in Sierra Capital and $5,000,000 in J.M.B. Realty. These were legitimate business investments that were profitable for the CTDU Pension Fund but also directly profited the defendant and Johnson unbeknownst to the Trustees. As charged in Racketeering Act Three, from November 29, 1989 through February 23, 1990, the defendant and Johnson solicited and received kickback payments from Bennett on multiple occasions from these investments totalling approximately $406,000, of which the defendant received about $200,000. Some of these payments were made in checks and some in currency. The defendant did not report the above proceeds on his 1988 or 1989 income tax returns. On November 1, 1989, during a meeting between the defendant, Johnson and Bennett to discuss the amounts of the kickback payments, Johnson made several verbal threats to Bennett.

In connection with the above scheme, it was necessary for the defendant and Johnson to launder several kickback checks they received from Bennett. Pursuant to Racketeering Act Four, on November 29, 1989, January 24, 1990, and February 1, 1990, the defendant and Johnson met with Timothy Evoy, an individual who was acquainted with the manager of a currency exchange in Chicago. Evoy brought the checks to Carol Palmsone, a currency exchange employee, and had her cash each of five checks totalling approximately $250,000. Palmsone required Evoy to fill out a customer signature card which Evoy completed in the name of Bennett utilizing some inaccurate identifying information of Bennett. Each of the five checks was subsequently cashed by Palmsone at a fee of

$500 per check. Additionally, Evoy charged Johnson approximately $2,250 for each check cashed.

In January 1991, after turning over the false customer signature card of Bennett, Palmsone was subpoenaed to testify before the grand jury. The defendant provided funds to Palmsone for her attorney representation. In February 1991, because Palmsone would be required to identify Bennett for the grand jury, Johnson pressed Bennett for a photograph of herself which he ultimately received. Racketeering Act Five charged that in or about February 1991, the defendant corruptly persuaded Bennett (to provide this photograph) with the intent to influence the testimony of Palmsone at the grand jury hearing. Additionally, the defendant counselled Evoy not to provide any information to authorities.

In another scheme, beginning in August 1987 and continuing through about January 1992, as charged in Racketeering Act Six, the defendant and Johnson received approximately monthly kickback payments from Ronald Marolda and David Nadell, stock brokerage company partners, primarily through investments from the CTDU Pension and Health and Welfare Funds. The payments ranged from $200 to $10,000. The defendant received a total of approximately $50,000 in kickback payments from Marolda and Nadell during this time. The defendant failed to report these proceeds on his 1987 through 1991 income tax returns.

It is the contention of the government that the defendant committed perjury when he testified falsely at his first trial including his denial of the receipt of kickback payments. The defendant is deemed to be equally culpable as Coconspirator Johnson with whom the defendant used his position as a fiduciary to violate the trust of the CTDU members and beneficiaries of the CTDU Pension and Health and Welfare Funds.

Agents from the Internal Revenue Service (Lynette Redxner) and the Department of Labor (Stephen Quisenberry and Jane

Yelvington) provided additional information regarding this case. The agents verified the facts in this case as reflected above. According to the agents, the investigation began with the Federal Bureau of Investigations in 1988 when allegations were received from taped telephone conversations with a CTDU accountant. This accountant indicated that there were questionable investments utilizing CTDU funds. The Department of Labor acquired this investigation in November 1989. The agents indicated that Susan Bennett was the initial target of this investigation based on the information received from the union accountant.

Both Bennett and Johnson agreed to cooperate with the investigation, Bennett in November 1990 and Johnson in June 1994, each providing information about the defendant. The agents maintained that the defendant has been aware of the investigation: (and testified to this effect) since 1988, when various records (including on investments, salaries and expenses) of the CTDU were subpoenaed through him. The agents opined that the defendant was the "brains of the operation and Johnson was the brawn." They asserted that the it was the defendant who had the technical expertise to fashion these types of investments and was the one who managed the paperwork.

The defendant did not acknowledge his participation in the offenses of conviction nor has he submitted a version to date. The defendant indicated at trial that he had the authority to make each of these investments and he did not receive any kickback payments from them.

Victim Impact

As indicated by the government, the primary victims in this case were the CTDU members and beneficiaries of the Pension and Health and Welfare Funds who suffered the loss of actual funds, as well as access to necessary health coverage.

Adjustment for Obstruction of Justice

The defendant was charged in Count Seven with attempting to corruptly persuade Ms. Susan Bennett with the intent of influencing her testimony. The defendant was acquitted of this count, however, he was convicted of Count One in which Racketeering Act Five entails this same conduct. Additionally, according to the government, the defendant counselled Coconspirator Evoy not to provide any information to authorities. Finally, it is the contention of the government that the defendant committed perjury during his first jury trial on this matter.

Adjustment for Acceptance of Responsibility

To date, the defendant has not submitted a written defendant's version. While a plea of not guilty does not alone preclude the possibility of acceptance of responsibility, the defendant's denial of participation in the instant offense, despite a guilty verdict, denotes a lack of personal acceptance for his actions.

Offense Level Computations

The 1994 edition of the Guidelines Manual has been used in this case.

According to Appendix A, the applicable guideline for Racketeer Influenced and Corrupt Organization (RICO) offenses is 2E1.1. Count One encompasses numerous predicate acts of the racketeering conspiracy. Pursuant to Application Note One of 2E1.1, underlying offenses should be treated as if contained in a separate count of conviction when there is more than one underlying offense. Guideline 2E1.1(a) directs the reader to assign either a base offense level of 19, or the offense level applicable to the underlying activities, whichever is higher. To determine whether subsection 2E1.l(a) (1) or (a) (2) results in the greater offense level, Chapter 3 adjustments are applied to both 2El.l(a) (1)

and (a) (2). For purposes of these guideline calculations, 2El.1(a) (2) results in the greater offense level and is therefore utilized in the ensuing calculations.

Count One (Racketeering Acts One through Three and Six)—Conspiracy to Engage in a Racketeer Influenced and Corrupt Organization (RICO); Counts Two through Four, Eight through, Ten, 14 through 18, and Relevant Conduct (Counts 11 through 13)—Offering, Accepting or Soliciting to Influence Operations of Employee Benefit Plan

Base Offense Level: The counts listed above are grouped together on one Worksheet A, pursuant to 3D1.2(d), based on aggregate harm. The guideline computations for Count One takes into account all racketeering activity related to kickbacks and also includes Counts Two through Four, Eight through Ten, 14 through 18 and relevant conduct (Counts 11 through 13), as predicate acts of the racketeering conspiracy which encompass "kickbacks." The United States Sentencing Commission Guideline for violation of Title 18, United States Code, Section 1962(d), is found in United States Sentencing Commission Guideline Manual, Section 2El.l. Guideline 2E1.1(a) (2) directs to apply the offense level applicable to the underlying racketeering activity which is 2E5.l. According to guideline 2E5.1(a) (1), the base offense level is ten for a bribe.

Specific Offense Characteristics: Pursuant to 2E5.1(b) (1), if the defendant was the fiduciary of the benefit plan or labor organization, increase by two levels.

According to 2E5.1(b) (2), the offense level is also to be increased by the number of levels: from the table in 2F1.l corresponding to the value of the improper benefit to the payer (the commission) which is greater than the value of the prohibited payment (the kickback). In this

case, the total value of the commissions received by all relevant parties is approximately. $l,802,000 ($331,000-Lelis; $48,000-Bennett; $823,000-Bennett; and $600,000-Marolda/Nadell). Therefore, pursuant to 2F1.l(b) (1) (M), if the value exceeded $1,500,000, but was less than $2,500,000, increase by 12 levels.

Victim-Related Adjustments: None.

Adjustments for Role in the Offense: None.

Adjustment for obstruction of Justice: None. It is the contention of the government that the defendant committed perjury during the initial trial in this case which would therefore merit an enhancement for obstruction. As the undersigned was not present in court during this trial, it is left to the Court's discretion to make a determination as to whether or not the defendant obstructed justice by perjurious testimony.

Adjusted Offense Level (Subtotal):

Count One (Racketeerinc Act Four)—Conspiracy to Engage in a Racketeer Influenced and Corrupt Organization (RICO); Counts Five and Six—Laundering of Monetary Instruments

Base Offense Level: The United States Sentencing Commission Guideline for a violation of Title 18, United States Code, Section 1956(a) (1) (B) *(1)*, is found in United States Sentencing Commission Guideline Manual, Section 2S1.1(a)(2), and calls for a base offense level of 20.

Specific Offense Characteristics: According to 2S1.1(b) (2) (C), if the value of the funds exceeded $200,000, but were less than $350,000, increase the offense level by two. The total amount of funds involved in the money laundering as charged in the indictment is approximately $250,000. Therefore, a two-level increase in the offense level is appropriate.

Victim-Related Adjustments: None.

Adjustments for Role in the Offense: Pursuant to 3B1.3, Abuse of a Position of Trust, if the defendant abused a position of trust in a manner that significantly facilitated the commission of the offense, increase the offense level by two levels. As the General Counsel and Vice President of the CTDU, the defendant had control over and access to union pension and health and welfare funds. It was this authority and access, which was only feasible due to the defendant's fiduciary position within the CTDU, that enabled the defendant to perpetrate this offense. Thus, a two-level increase was applied.

Adjustment for Obstruction of Justice: Pursuant to guideline 3C1.1, if the defendant willfully obstructed or impeded the administration of justice, or attempted to do so, increase the offense level by two levels. Additionally, according to Application Note 3(a) of this guideline, "threatening, intimidating, or otherwise unlawfully influencing a codefendant or witness, either directly or indirectly, or attempting to do so," constitutes obstruction. Both the government and the case agents referenced the unlawful influencing of Ms. Bennett by Coconspirator Johnson to produce a photograph of herself so that Ms. Palmsone could falsely identify her for the grand jury. Though the defendant was not directly involved in obtaining the photograph from Ms. Bennett, the defendant had knowledge of this dilemma as evidenced by the following: the defendant obtained and provided funds for Palmsone's attorney representation which directly related to this matter and there was also testimony from Johnson that the defendant was aware of the situation and told Johnson to handle it as necessary. Additionally, the defendant directed Evoy not to provide any information to authorities regarding this matter. Thus, though acquitted at trial of these

charges, the defendant is held accountable for these activities based on a standard of preponderance of the evidence for purposes of sentencing.

Adjusted Offense Level (Subtotal):

Count One (Racketeering Act Five)—Conspiracy to Engage in a Racketeer Influenced and Corrupt Organization (RICO); Tampering With a Witness

Base Offense Level: As stated above, though acquitted at trial of these charges, the defendant is held accountable for these activities based on a standard of preponderance of the evidence for purposes of sentencing. United States Sentencing Commission Guideline for a violation of Title 18, United States Code, Section 1512(b) (1), is found in United States Sentencing Commission Guideline Manual, section 2.J1.2, Obstruction of Justice. Pursuant to the cross reference-under 2J1.2(c), "if the offense involved obstructing the investigation or prosecution of a criminal offense, apply 2X3.1 (Accessory After the Fact)..., if the resulting offense level is greater than that determined above." The underlying offense in this case is the money laundering offense. Guideline 2X3.1(a) directs to apply six levels lower than the offense level plus specific offense characteristics for the underlying offense (22), which yields an offense level of 16.

Specific Offense Characteristics: None.

Victim—Related Adjustments: None.

Adjustments for Role in the Offense: None.

Adjustment for Obstruction of Justice: None. As stated, above, it is left to the Court's discretion to make a determination as to whether or not the defendant further obstructed justice by perjurious testimony.

Adjusted Offense Level (Subtotal):

Counts 19 through 22 — Fraudulent Income Tax Returns

Base Offense Level: The United States Sentencing Commission Guideline for a violation of Title 26, United States Code, Section 7206(1), is found in United States Sentencing Commission Guideline Manual, Section 2T1.l. Guideline 2Tl.1(a), directs to utilize guideline 2T4.l, the Tax Table. During 1988 to 1991, the defendant underreported his gross income by a total of approximately $250,000. Additionally, pursuant to lBl.3, relevant conduct, the defendant is accountable for an additional $82,500 not reported on his 1987 income tax returns. As directed by guideline 2T1.l(c) (1) (A), the value of the tax loss equals 28 percent of the gross income ($332,500) underreported, which yields a figure of $93,100. Thus, pursuant to 2T4.1(I), the base offense level is 14.

Specific Offense Characteristics: Pursuant to guideline 2T1.l(b) (1), if the defendant failed to report income exceeding $10,000 in any year from criminal activity, increase by two levels.

Victim-Related Adjustments: None.

Adjustments for Role in the Offense: None.

Adjustment for Obstruction of Justice: None. As stated above, it is left to the Court's discretion to make a determination as to whether or not the defendant further obstructed justice by perjurious testimony.

Adjusted Offense Level (Subtotal):

Mutiple-Count Adjustment All of the counts are grouped together on one line of Worksheet B as follows. Count One (Racketeering Acts One through Three and Six), Counts Two through Four, Eight through Ten, and 14 through 18 are

grouped together, pursuant to 3D1.2(d), based on aggregate harm. Count One (Racketeering Act Four), Counts Five, Six, 19 through 22 and the relevant conduct are grouped together with each other and the above counts pursuant to 3D1.2(c). Finally, Count One (Racketeering Act Five) and Count Seven are grouped together pursuant to 3D1.2(a) and are also grouped with Count One (Racketeering Act Four), Count Five and Count Six, pursuant to 3D1.2(c).

		Units
Adjusted Offense Level for Counts One through Six, 8 through 10, 14 Through 22 and Relevant Conduct -	26	1
Total Number of Units		1
Greater Adjusted Offense Level	26	
Increase in Offense Level	0	
Combined Adjusted Offense Level:		26

Adjustment for Acceptance of Responsibility: The defendant has not demonstrated an affirmative acceptance of responsibility for his criminal conduct. Therefore, pursuant to U.S.S.G. 3E1.l(a), the offense is not reduced by two levels. 0

Total Offense Level: 26

Chapter Four Enhancements: None. 0

Total Offense Level: 26

PART B. DEFENDANT'S CRIMINAL HISTORY:

Juvenile Adjudication(s)

None.

Adult Criminal Conviction(s)

None.

Criminal History Computation

A check with the Federal Bureau of Investigation National Crime Information Center and local police authorities, revealed no prior arrests or convictions for the defendant. Therefore, his criminal history points are zero and he has a criminal history category of I.

Other Criminal Conduct

Though not charged in the indictment nor addressed in the government's version, the agents (and subsequently the government), explained to the undersigned that funds from two local unions affiliated with the CTDU were examined (which are separate from pension or health and welfare funds), and the agents concluded that both the defendant and Johnson had increased their salaries from these funds by $86,000 each, during approximately 1989 to 1992, without authority. The government affirmed that the defendant and Johnson received these additional salaries. However, the government continued that because there was dissension among the CTDU Board of Trustees as to whether or not this conduct was authorized, no formal charges related to this conduct were initiated.

Also, information received from the Downers Grove Police Department indicated that the defendant was cited for a code violation for failure to obtain a permit for a fence. On January 25, 1993, the defendant was arrested pursuant to a warrant issued for his failure to pay the fine. The defendant was adjudged guilty and assessed a fine and court costs. The date of adjudication and the amount of the fine assessed were not available from the Downers Grove police records.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

The defendant Paul Leonard Glover, was born on July 9, 1947, in Bedford, Indiana, where he resided until approx-

imately 1951. In 1951, he relocated to Sarasota, Florida where he remained until approximately 1963. In 1963, the defendant moved to Chicago, Illinois, and he has remained in the Chicago area since that time. The defendant's present legal address is located in Downer's Grove, Illinois.

The defendant related that his parents divorced when he was approximately six years old and he remained with his mother until the age of 14. Per an agreement by both the defendant's parents and himself, the defendant was reared by his father after the age of 14. The defendant asserted that his parent's divorce made him a more responsible person because his mother worked evenings as a waitress and the defendant was left to care for his younger sister. The defendant affirmed that he shared close relationships with all family members. The defendant continued that presently, his relationship with his mother is strained because she suffers from depression and has attempted suicide on several occasions.

The defendant reported that his father, Paul Richard Glover, died at the approximate age of 57 from a stroke. Prior to his death, he was employed as an electrician. The defendant's mother, Teresa Glover (nee: Descoli), is 64 years old and resides in Elgin, Illinois. She is unemployed and living in an apartment with a roommate.

The defendant has one sister. Cathy Sinclair (flee: Glover) is 45 years old and resides in Sarasota, Florida. She is divorced with one child and is employed as a supervisor at Neilson Television. The defendant reported that to his knowledge, no family member has a prior criminal record.

The defendant first married Maureen Conway in 1969 in Chicago, Illinois. The defendant explained that he met Ms. Conway in college in approximately 1965. The defendant related that after graduating from college, it became necessary for him to work evenings regularly and he and Ms. Conway "grew apart." They came to realize that they were

incompatible and ultimately divorced in 1980. There were no children as a result of this union.

The defendant is presently married to Deborah Clover (nee: Reineke). They met in 1981 through a mutual friend and were married in July 1982. The defendant related that he and his spouse have a strong relationship which has survived tumultuous periods of both employment and legal problems. According to the defendant, he and his wife share many common interests and values. Mrs. Glover has two children from a previous relationship with whom the defendant is very close. Brian Helfrich, age 19, and Kevin Helfrich, age 18 (both the sons of John Helfrich, Mrs. Glover's previous spouse), reside in Downers Grove, Illinois, with the defendant and his spouse.

The undersigned conducted an interview with the defendant's wife, Deborah Glover, age 43, on July 31, 1995. Mrs. Glover is employed full-time as a clothing salesperson at Sweet William in Hinsdale, Illinois. Mrs. Glover corroborated basic information about the defendant. Mrs. Glover described their marriage as "excellent" stating the defendant is "my best friend." She affirmed that they share open and honest communications. Mrs. Glover stated that she was employed part-time as a secretary for Glover and Associates until the indictment in this case (January 1995). At that time, Glover and Associates began to lose patronage and new customers have remained minimal to the present. According to Mrs. Glover, the current income from this business consists primarily of costs incurred from prior completed services. Mrs. Glover acknowledged that the company was placed in her name from the onset due to the investigation pending at that time involving the defendant. Mrs. Glover affirmed her love and emotional support for the defendant.

Physical Condition

The defendant is 6' tall, weighs 195 pounds, has brown hair and blue eyes. The defendant is not currently under the care

of a physician nor is he prescribed any medications. He reported no scars, tattoos or distinguishing marks on his body. The defendant denied any major surgeries aside from a gall bladder removal and kidney stones in the early 1980s for which he was treated at Michael Reese Hospital in Chicago, Illinois. He does not presently suffer from any known allergies and described his overall health as good.

Mental and Emotional Health

The defendant reported that his mother was diagnosed with depression and has been hospitalized on an inpatient basis in the psychiatric unit of many hospitals during the last 20 years. According to the defendant, his mother has attempted suicide on many occasions including a recent attempt wherein she laid down on the street in front of a metermaid truck. She is currently prescribed several psychiatric medications including Prozac, Valium, Dilantin and Phenobarbital and is living in an apartment with a roommate. As mentioned above, the defendant is somewhat estranged from his mother due to her recent behavior. The defendant asserted that there is no personal history of mental illness or mental health problems. He reported no present/previous treatment or counseling as the result of any mental health problems. The defendant stated that he and his first wife sought marital counseling in 1980 prior to their divorce. The defendant stated that they saw this counselor weekly for about one and a half years but he was unable to recall the name of the therapist. The defendant was cooperative during the presentence investigation process and personal interviews.

Substance Abuse

The defendant reported that at the time of his death, his father was a recovering alcoholic. While the defendant never observed any behavioral effects of alcohol on his father, he believes that his father's alcohol consumption destroyed his ability to resist, disease and ultimately led to his death. The

defendant denied any personal substance abuse problems or participation in any treatment programs for alcohol or drug usage. The defendant acknowledged that he experimented with marijuana, on a few occasions in 1967. However, he stated that presently, he does not consume any alcohol or illicit substances. On June 27, 1995, the defendant submitted a urine sample to the probation department as part of the presentence investigation process. The sample was negative for the presence of any illicit substances (verified).

Education and Vocational Skills

The defendant reportedly attended Bedford High in Bedford, Indiana, from 1961 to 1965 receiving his diploma in 1965 (unverified). The defendant next attended DePaul University in Chicago, Illinois., from September 1967 to December 1974, earning a Bachelor of Arts degree in English (verified). The defendant also attended DePaul University College of Law from September 7, 1971 to January 13, 1975, receiving his Juris Doctor (J.D.) (verified). Finally, the defendant reportedly attended the Illinois Institute of Technology in Chicago, Illinois, from 1982 to 1984, receiving a Master's degree in Labor Relations (unverified). The defendant did not receive any further educational or vocational degrees. He denied any academic or behavioral problems and described himself as an above-average student.

Employment Record

September 1992 to Present (Partially Verified)

The defendant reported that he i. self-employed as a consultant/labor lawyer for Glover and Associates, a business owned jointly by his spouse and Mr. Matt Perovic (the proceeds are split on an equal basis). The defendant estimated that his average annual income from this employment is approximately $100,000.

September 13, 1970 to July 31, 1992 (Unverified).

The defendant was employed by the Chicago Truck Drivers Union in Chicago, Illinois. He held several positions includeing General Counsel; Vice President; Health and Welfare Fund Trustee and Fund Manager and Pension Fund Trustee. The defendant earned approximately $12,775 per month by the end of this employment. The defendant committed the instant offense while employed in this capacity. However, the defendant's employment was terminated as a result of the expiration from his term of office as Vice President as well as his replacement as General Counsel rather than as a result of his participation in the instant offense.

From 1965 to 1967, the defendant was reportedly in the United States Army (unverified). His service number is US 55887381 and the defendant reported that he was honorably discharged at the rank of sergeant in 1967. The defendant maintained that he was not involved in any disciplinary actions and he did not acquire any specialized training while in the army.

Financial Condition: Ability to Pay

The defendant submitted a signed joint financial statement. The following reflects the defendant's 50 percent interest in assets and debts. Assets and liabilities marked with an asterisk (*) represent 100 ownership by the defendant. In 1983, the defendant filed for bankruptcy in Chicago, Illinois. On October 4, 1983, the defendant was discharged from debt. A review of the defendant's adjusted gross income received from the Internal Revenue Service for 1988 through 1994, reveals that the defendant earned $101,119 in 1988; $124,200 in 1989; $138,234 in 1990; $158,781 in 1991; $122,423 in 1992; $59,069 in 1993; and $143,425 in 1994. The defendant's spouse has a 50 percent interest in Glover and Associates (the other 50 percent is held by Mr. Matt Perovic); thus, the defendant has no equity in that asset. Corporation

returns indicated that Glover and Associates earned ($2,834) in 1992; $69,653 in 1993; and $117,101 in 1994. To date, the defendant has paid approximately $180,000 in attorney fees to Thomas Breen/George Murtaugh.

Assets		
Cash		
First Chicago (Checking Account)	(See Note A)	$1,250.00
Subtotal:		$1,250.00
Unencumbered-Assets		
American Mutual Life Insurance	(See Note B)	0.00
1990 Mazda Miata	(See Note C)	0.00
1989 Jeep Cherokee		2,000.00
1988 Chevrolet Blazer		4,000.00
Household Items		$25,000.00
Subtotal:		$31,000.00
Equity in Other Assets	(See Note D)	$ 0.00
Subtotal:		$ 0.00
Total Assets:		$32,250.00
Unsecured Debts		0.00
Total Unsecured Debts:		$ 0.00

NET WORTH:	$ 32,250.00
Monthly Cash Flow	
Income	
Defendant's Salary	$ 6,000.00
Spouse's Salary	1,600.00
Total Income:	$ 7,600.00
Necessary Living Expenses	
Mortgage	$ 2,200.00
Electricity	125.00
Heat/Gas	75.00
Water/Sewer	30.00
Telephone	60.00
Groceries/Supplies	1,200.00
Automobile Insurance	300.00
Health Insurance	180.00
Life Insurance	200.00
Homeowner's Insurance	30.00
Transportation	200.00
Medical	150.00
Clothing 300.00	
Education (for Children)	300.00
Total Expenses:	$ 5,350.00
Net Monthly Cash Flow:	$ 2,250.00

Note A: The defendant reported that his spouse has 100 percent interest in a money market account which he estimated at $5,000.

Note B: This life insurance policy is a term policy; therefore, there is no cash surrender value or equity in this asset.

Note C: This asset is owned solely by the defendant's spouse; thus, he has no equity in this asset.

Note D: The defendant stated that his current residence, owned solely by his spouse, was purchased in 1984 for approximately $120,000. The defendant estimated that the current fair market value of this residence is 325,000 and there is a mortgage balance of approximately $180,000. The defendant has no equity in this asset and believes he will have to sell this residence subsequent to his sentencing.

Analysis

The defendant has a net worth of approximately $32,250 and a present net monthly cash flow of $2,250. Therefore, he has the immediate ability to make some restitution and/or fine payments. However, the defendant's likely incarceration will impact his monthly income and thus, the amount he will be able to pay while in custody. It is noted that a special verdict by the Court regarding forfeiture allegations indicated that a total of $325,000 should be forfeited by the defendant to the United States which, to date, has not been satisfied. Additionally, the government has requested that the defendant be ordered to pay $100,000 in restitution (it is noted that the undersigned found the restitution to entail a total of $1,011,294). The defendant, if incarcerated, will have the $500 per year if incarcerated for more than three years, and up to $100 per year if sentenced to less than three years incarceration, through the Inmate Financial Responsibility Program.

PART D. SENTENCING OPTIONS:

Custody

Statutory Provisions: The cumulative maximum term of imprisonment for the 18 counts of conviction is 105 years. The maximum term of imprisonment for Counts One, Five and Six is 20 years respectively, pursuant to Title 18, United States Code, Sections 1962(d) and Section 1956(a) (1) (B) (i). The maximum term of imprisonment for Counts Two through

Four, Eight through Ten and 14 through 22, is three years each pursuant to Title 18, United States Code, Section 1954 and Title 26, United States Code, Section 7206(1).

Guideline Provisions: Based on the total offense level of 26 and a criminal history category of I, the guideline imprisonment range is 63 to 73 months incarceration.

Impact of the Plea Agreement

There is no plea agreement in this case as the defendant was convicted subsequent to a jury trial.

Supervised Release

Statutory Provisions: The defendant. was convicted of three Class C felonies and 15 Class E felony counts. Pursuant to Title 18, United States Code, Section 3583, the maximum term of supervised release for Class C felonies is not more than three years and for Class E felonies, not more than one year.

Guideline Provisions: The Court shall order a term of supervised release to follow, imprisonment when required by statute- For the three Class C felonies, the applicable term of supervised release is at least two years, but not more than three years, pursuant to 5D1.2(b)(2). For the 15 Class E felonies, the applicable term of supervised release is not more than one year, pursuant to 5D1.2(b) (3).

Probation

Statutory Provisions: Pursuant to Title 18, United States Code, Section 3561, the authorized term of probation for Class C and E felonies is not less than one nor more than five years.

Guideline Provisions: Pursuant to 5B1.l(a), the defendant is not eligible for probation as the applicable guideline range is not in either Zone A or B of the Sentencing Table.

Fines

Statutory Provisions: Counts One through Four, Eight through Ten, and 14 through 22 each have a respective maximum fine of $250,000. Counts Five and Six each have a respective maximum fine of $500,000. Therefore, the cumulative maximum fine for which the defendant is accountable is $5,000,000, pursuant to Title 18, United States Code, Section 3571. A special assessment of $50 is mandatory on each count of conviction for a total of $900, pursuant to Title 18, United States Code, Section 3013. Finally, a special verdict by the Court regarding the forfeiture allegations indicated that a total of $325,000 should be forfeited by the defendant to the United States.

Guideline Provisions: The fine range for this offense is from $12,500 to $125,000, pursuant to United States Sentencing Guideline 5E1.2(c)(3), the Fine Table.

Subject to the defendant's ability to pay, the Court shall impose an additional fine-amount that is at least sufficient to pay the cost to the government of any imprisonment, probation, or supervised release,-pursuant to United States Sentencing Guideline 5El.2(i).

The most recent advisory from the Administrative, Office of the United States Courts suggests a monthly cost of $1,779 for imprisonment; a monthly cost of $1,183 for community confinement; and a yearly cost of $2,344 for supervision.

Restitution

Statutory Provisions: Pursuant to Title 18, United States Code, Section 3663, the Court may order restitution to any victim of the offense. The government has indicated that the total amount of restitution is $100,000 to be paid to Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund, 809 West Madison, Chicago, Illinois, 60607. However, it appears to the undersigned that there was an

additional loss of $1,011,294 to the CTDU from the Coal star/Omega Gold investment which could also be ordered as restitution.

Guideline Provisions: In accordance with the provisions of the United States Sentencing Guideline 5E1.l, restitution shall be ordered where indicated.

Denial of Federal Benefits

Statutory Provisions: Denial of federal benefits is not applicable to this case.

Guideline Provisions: Denial of federal benefits is not applicable to this case.

PART E. FACTORS THAT MAY WARRANT DEPARTURE:

There are no factors concerning the offense or the offender that would warrant departure from the prescribed guidelines.

Respectfully submitted,

William T. Foster
Chief U. S. Probation Officer

by /s/ Elisa J. Ehrlich
ELISA J. EHRLICH
U. S. Probation Officer

Approved:

/s/ Gregory Prestipino
GREGORY A. PRESTIPINO
Supervising U.S. Probation Officer August 14, 1995

Attachments: Government's Version
(Including Victim Impact Statement)
Worksheets

EJE:eje/cjl

UNITED STATES DISTRICT COURT JUDGE
Office of the Chief Probation Officer
55 East Monroe, Suite 1500
Chicago, Illinois 60603

Honorable William T. Hart — September 27, 1995

STATEMENT OF CORRECTION

RE: GLOVER., PAUL L.
Docket No. 95 CR 40-1
Disposition Date: September 21, 1995

On September 21, 1995, during the sentencing hearing of the above-named individual, Your Honor ordered that the following corrections be made to the presentence investigation report:

Offense Level Computations.

Count One (Racketeering Acts One through Three and Six) —Conspiracy to Engage in a Racketeer Influenced and Corrupt Organization (RICO); Counts Two through Four, Eight through Ten, 14 through 18, and Relevant Conduct (Counts 11 through 13)—Offering, Accepting or Soliciting to Influence Operations of Employee Benefit Plan

Adjustment for Obstruction of Justice: The Court determined at the time of sentencing that the defendant committed perjury during his initial trial on this matter. Thus, pursuant to 3C1.1, Obstruction of Justice, a. two level increase is applied.	2
Adjusted Offense Level (Subtotal):	26
Total Offense Level:	26

Multiple-Count Adjustment

As ruled by the Court at sentencing, Counts One (Racketeering Act Four), Count Five, arid Six are not groupable as they do not meet any of the requirements of 3D1.2. All of the other counts are grouped together on one line of Worksheet B as follows: Count One (Racketeering Acts One through Three and Six), Counts Two through Four, Eight through Ten, and 14 through 18 are grouped together, pursuant to 3D1.2(d), based on aggregate harm. Counts 19 through 22 and the relevant conduct are grouped together with each other and the above counts pursuant to 2 (c). Finally, the relevant conduct incorporated in Counts One (Racketeering Act Five) and Seven are grouped together pursuant to 3D1.2(a) and are also grouped with Count One (Racketeering Act Four), Count Five and Count Six, pursuant to 3D1.2(c).

Adjusted Offense Level for Counts One (except Racketeering Act Four) through Four, Eight through Ten, 14 through 22-and Relevant Conduct	26	1
Adjusted Offense Level for Counts One (Racketeering Act Four), Five and Six	26	1
Total Number of Units		2
Greater Adjusted Offense Level	26	
Increase in Offense Level		2
Combined Adjusted Offense Level:		28
Adjustment for Acceptance of Responsibility: The defendant has not demonstrated an affirmative acceptance of responsibility for his criminal conduct. Therefore, pursuant to U.S.S.G. 3E1.1(a), the offense is not reduced by two levels		0
Total Offense Level:		28

PART D. SENTENCING OPTIONS:

Custody

Guideline Provisions: Based on the total offense level of 28 and criminal history category of I, the guideline imprisonment range is 78 to 97 months incarceration.

Respectfully Submitted,

/s/ Elisa J. Ehrlich
ELISA J. EHRLICH
U.S. Probation Officer
Telephone: 312/435-7629

Reviewed by:

/s/ Gregory A. Prestipino
GREGORY A. PRESTIPINO
Supervising
U.S. Probation Officer

EJE/eje/dr

Attachment: Corrected Worksheets A & D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 95 CR 40

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PAUL GLOVER,
Defendant.

Chicago, Illinois
September 21, 1995
1:30 o'clock pm.

TRANSCRIPT OF PROCEEDINGS - Sentencing
BEFORE THE HONORABLE WILLIAM T. HART

For the Defendant:

APPEARANCES

For the Plaintiff: HON. JAMES B. BURNS
UNITED STATES ATTORNEY
BY: MR. STEPHEN D. ANDERSON and
MR. DAVID BUVINGER
219 South Dearborn
Chicago, Illinois 60604

For the Defendant: MR. GEORGE J. MURTAUGH, JR.
100 W. Monroe, Suite 1800
CHICAGO, ILLINOIS 60603

Court Reporter: FRANCES CACIOPPO, CSR, RPR
Official Court Reporter
219 S. Dearborn Street, Suite 2502-A
Chicago, Illinois 60604
(312) 435-5561

THE CLERK: 95 CR 40, United States of America versus Paul Glover for sentencing.

THE COURT: Good afternoon.

MR. ANDERSON: Good afternoon, your Honor.

MR. MURTAUGH: Good afternoon, your Honor. George Murtaugh on behalf of Mr. Glover.

MR. ANDERSON: On behalf of the United States, Stephen Anderson and David Buvinger.

MS. EHRLICH: Elisa Ehrlich, U.S. Probation.

THE COURT: Ladies and gentlemen, I will begin the proceedings by inquiring first of counsel for Mr. Glover as to whether or not you and Mr. Glover have reviewed the presentence investigation and discussed it.

MR. MURTAUGH: We have, your Honor.

THE COURT: Do you have any changes to propose?

MR. MURTAUGH: No, your Honor.

THE COURT: No changes to propose to the presentence investigation report?

MR. MURTAUGH: None at all, your Honor.

THE COURT: The government, I understand, has changes to propose.

MR. ANDERSON: Yes, your Honor.

The United States has filed with the Court the Government's position paper with regard to sentencing factors. I believe that that has been provided to the Court.

THE COURT: I have it.

MR. ANDERSON: If your Honor wishes, I could go over that again, but it has been provided to the Court.

In essence, there is three key areas in which we believe that the preparation of the preliminary PSI and the final copy of the PSI is inaccurate. Those areas are, one, the area of grouping; secondly, an area in which Mr. Glover's perjury at trial needs to be taken into account in the sentencing; and, third, his place of leadership within the conspiracy and the various conspiracies within this case.

Within each of those areas the United States has provided the Court research in which other circuits have held that the increases that the United States recommends here have been found to be appropriate.

If your Honor wishes, I can go into more detail in each of those areas.

THE COURT: Well, I will take up each one. The first question of grouping, the probation officer has grouped all of the offenses together rather than separately.

Mr. Murtaugh, do you want to comment on that?

MR. MURTAUGH: No, your Honor. I just think it's appropriate. It's one common—if the jury was and did believe apparently that it was one joint effort by Johnson and Mr. Glover, I think that all of the transactions that the government asserts should be considered individually ought not be considered individually. I think there are appropriately grouped.

THE COURT: Mr. Anderson?

MR. ANDERSON: The United States' position is set forth. That is, although the Seventh Circuit has not ruled on this issue, other Circuits have, including the First Circuit, the Fourth Circuit, the Tenth Circuit, the Ninth and the Eleventh Circuits.

Each of these circuits have held that in similar fact situations that they should not be grouped. That is, there are separate victims with regard to the money laundering and the underlying offenses. That is the position of the United States.

THE COURT: I think it's clear. I think you are clearly right, that the case law is overwhelming in your favor on this point. I have to agree that the offenses of money laundering, kickback and tax should be separately grouped. We will treat them and I will direct the probation officer to submit a revised presentence investigation that separately groups the offenses. We will move on from there. I believe you are clearly right on that point.

Your next point is with respect to what?

MR. ANDERSON: The second is with regard to the obstruction of justice, your Honor. There it's the position of the United States, the initial position is that the defendant.

[Docketed Oct. 2, 1995]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 95 CR 40-1

UNITED STATES OF AMERICA

v.

PAUL L. GLOVER

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

☐ pleaded guilty to count(s).

☒ was found guilty on count(s) 1 through 6, 8, 9, 10, 14 through 22 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 18 USC 1962 (d)
Nature of Offense: Conspiracy to Conduct Racketeering
Date Offense Concluded: January 1992
Court Number(s): One

Title & Section: 18 USC 1954
Nature of Offense: Offer, Accept, or Solicitate to Influence Operations of Employee Benefit Plan
Date Offense Concluded: January 1992
Court Number(s): 2, 3, 4, 8, 9, 10, 14, 15, 16, 17, 18

Title & Section: 18 USC 1956(a)(1)(B)(i)
Nature of Offense: Money Laundering
Date Offense Concluded: 2/1/90
Court Number(s): 5 & 6

Title & Section: 26 USC 7206(1)
Nature of Offense: Fraudulent Income Tax Returns
Date Offense Concluded: 4/15/92
Court Number(s): 19, 20, 21, 22

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 7, 11, 12 and 13 and is discharged as to such count(s).

☐ Count(s)___(is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 900.00, for count(s) 1-6, 8, 9, 10, 14-22, which shall be due ☒ immediately. ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 303-54-2473

Defendant's Date of Birth: 7/9/47

Defendant's Mailing Address:

4916 Saratoga
Downers Grove, Illinois 60515

Defendant's Residence Address:

Same as above

Date if Imposition of Sentence: September 21, 1995

Signature of Judicial Officer: William T. Hart

Name & Title of Judicial Officer:
William T. Hart, U.S. District Judge

Date: September 21, 1995

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of EIGHTY-FOUR (84) MONTHS on Counts 1, 5 and 6; THIRTY-SIX (36) MONTHS on Counts 2, 3, 4, 8, 9, 10, 14, 15, 16, 17 and 18; THIRTY-SIX (36) MONTHS on Counts 19, 20, 21 and 22. All terms imposed are to run Concurrent. Pursuant to Title 29, United States Code, Section 504, the defendant may not in any capacity be involved in any labor organization for a period of thirteen years after end of imprisonment.

The defendant being a lawyer; the Clerk of the Court is directed to send copies of this judgment and commitment order to The Attorney and Disciplinary Commission and to The Executive Committee of this Court.

Defendant informed of his right to file a timely notice of appeal.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

☐ at __am/pm on __
☐ as notified by the United States marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☒ Before 2 p.m. on November 28, 1995.
☒ as notified by the United States marshal, an/or
☒ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on __ to __ at__, with a certified copy of this judgment.

United States Marshal
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

☐ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution

Payments of restitution are to be made to:

☐ the United States Attorney for transfer to the payee(s).

☐ the payee(s).

Restitution shall be paid:

☐ in full immediately.

☐ in full not later than_____

☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☐ in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☒ The defendant is ordered to forfeit the following property to the United States:

the total sum of $350,000 pursuant to Title 18, U.S.C. Sections 982and 1963 (See attached preliminary order of forfeiture dated 9/21/95)

Defendant is further ordered to pay the costs of prosecution to the United States in the sum of $16,811.84.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 28

Criminal History Category: I

Imprisonment Range: 78 to 97 months

Supervised Release Range: 1 to 3 years

Fine Range: $12,500 to $5,000,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $———.

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

[Filed Apr. 16, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3346

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PAUL GLOVER,
Defendant-Appellant.

Appeal from the United States
District Court, Northern District
No.: 95 C 40
Judge Hart

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, PAUL GLOVER

GEORGE J. MURTAUGH, JR.
100 W. Monroe Street
Suite 1800
Chicago IL 60603
312/781-0940

THOMAS M. BREEN
MARTIN, BREEN & MERRICK
53 W. Jackson Boulevard
Suite 1460
Chicago, IL 60604
312/360-1001

Attorneys for Defendant-
Appellant, PAUL GLOVER

ORAL ARGUMENT REQUESTED

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Appeal from the United States
District Court, Northern District
No.: 95 C 40
Judge Hart

CERTIFICATE OF INTEREST

1. Full name of all parties: PAUL GLOVEP..
2. Does not apply, not a corporation.
3. All finns or associates who have appeared in the District Court or are expected to appear before this Honorable Court of Appeals:

THOMAS M. BREEN
Martin, Breen & Merrick
53 W. Jackson Blvd., Suite 1460
Chicago, IL 60604
312/360-1001

GEORGE J. MURTAUGH, JR.
100 W. Monroe Street
Suite 1800
Chicago, IL 60603
312/781-0940

DATED this 15th day of April,

/s/ George J. Murtaugh, Jr.
GEORGE J. MURTAUGH, JR.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 18 U.S.C., §3231.

This Court has jurisdiction pursuant to 28 U.S.C., § 1291, an appeal from a final judgment.

The sentence in this case was entered on September 21, 1995. Notice of Appeal was timely filed on September 24, 1995.

ISSUES PRESENTED ON APPEAL

I.

WAS THE DEFENDANT DENIED A FAIR TRIAL BY THE INTRODUCTION OF HIS INCOMPLETE TESTIMONY AT A PRECEDING TRIAL?

II.

DID THE DISTRICT COURT ERR BY ENHANCING DEFENDANT'S SENTENCE FOR PERJURY AT A PRIOR TRIAL OF THIS CASE?

STATEMENT OF THE CASE

Defendant, PAUL GLOVER (herinafter "Glover"), appeals from a judgment entered by the Honorable William D. Hart on September 21, 1995.

Following a jury trial, the Court entered judgment on 18 U.S.C. § 1962(d); Conspiracy; 18 U.S.C. § 1954, Offer or Acceptance to Influence Operation of an Employee Benefit Plan; 18 U.S.C. § 1956(a) (1) (B), Money Laundering; and 16 U.S.C. § 7206(1), Fraudulent Income Tax Returns. The District Court entered a sentence of 84 months and 36 months, concurrently, and a term of three years supervised release.

SUMMARY OF ARGUMENTS

I.

THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF HIS INCOMPLETE TESTIMONY FROM A PRIOR TRIAL

This case was tried to two juries, the first jury was unable to reach a verdict; the second convicted the defendant. Defendant, PAUL GLOVER (hereinafter "Glover"), testified at the first trial, he did not testify at the second. However, the District Court allowed the Government to introduce portions of Glover's testimony from the first trial as admissions.

Defense counsel sought to introduce the entirety of Glover's testimony, after redacting 30 pages of background information. The Court denied that request and overruled an objection to the introduction of the testimony.

Defendant argues that this procedure denied him a fair trial.

II.

THE DISTRICT COURT ERRED IN ENHANCING DEFENDANT'S SENTENCE UPWARD AS A RESULT OF HIS TESTIMONY AT A PREVIOUS TRIAL

At sentencing, the District Court noted that, in its opinion, Glover had perjured himself at the first trial. Thus, the Court enhanced Glover's sentencing level two additional points.

On appeal, defendant argues that the determination to enhance the sentence was incorrect under the applicable facts and law.

STATEMENT OF FACTS

The testimony at the trial of this case revealed that in 1985, Glover was elected an officer of the Chicago Truck Drivers Union Local 705, Independent ("C.T.D.U."). Concurrent with

his Union position, Glover also assumed responsibilities with Taft-Hartley Trust Funds sponsored by the Union. The union sponsors a Health and Welfare Fund and a Pension Fund. (Tr. 46-59, 87.)

The Trust Funds are operated by two Union and two management trustees. Each Fund also has a Fund Manager who makes day-to-day decisions. (Tr. 90.) The Funds had money from weekly contributions as well as reserves and assets, which were invested in various types of accounts and instruments. (Tr. 146.) The Trust Funds had investment policies governing the selection and variety of investments. (Tr. 166.)

The C.T.D.U. Funds made investments in certain vehicles including Putnam and Kemper Funds, Coalstar stock, JMB Realty and Sierra and stocks through M.D. Sass, a broker. (Tr. 276-305.) These various investments triggered payments of commissions to brokers.

John Johnson ("Johnson") was a Union officer who was elected with Glover. Johnson served as Fund Manager for the Pension Fund, Glover did the same for the Welfare Fund. (Tr. 305, 323.)

Johnson and Glover reviewed an investment for the Pension Fund in a stock called "Coalstar." In 1987, the Pension Fund had $1 million in bonds in the Mid-City Bank. (Tr. 322.) The bonds were sold by Johnson and Glover to generate money for investment in Coalstar. This transaction was accomplished without any action by. the Pension Fund Trustees. (Tr. 322-23.) The investment in Coalstar was made through an individual named John Lelis ("Lelis") who received a commission in excess of $300,000 on the investment. Johnson testified that Lelis paid approximately $120,000 of that commission to him and that he split the money with Glover. (Tr. 329.)

In 1989, the Pension Fund made investments in real estate funds. Commission resulting from those investments were paid to Sue Bennett ("Bennett"). The specific real estate funds were JMB Realty and Sierra. (Tr. 357.) The commissions paid by the Funds varied from 4-7 percent. (Tr. 361.) After the Funds invested approximately $15 million in Sierra and JMB Realty, Johnson testified that on November 1, 1989, he, Glover and Bennett met at the Italian Village Restaurant. At the meeting, kickbacks were discussed (Tr. 365) and according to Johnson, Bennett began to pay him money about one month later. (Tr. 379.) The money was paid by check and Johnson negotiated the checks at a currency exchange through a man named Tim Evoy ("Evoy"). (Tr. 380-85.) Johnson testified that he divided the cash which he received from Evoy with Glover. (Tr. 387.)

Johnson told the jury that he used this check procedure to obtain cash and that Bennett also made payments of $60,000 and. $90,000 in cash, which he said he split with Glover. (Tr. 391.)

Johnson also described his relationship with Ron Marolda ("Marolda"), a stockbroker. Marolda told Johnson that if the Pension Fund invested money through M.D. Sass Company, he would be in a position to earn commissions and kickback $15,000-$16,000 per month. (Tr. 409-13.) Johnson told the jury that he discussed this plan with Glover, who agreed. (Tr. 414.) In 1990, Marolda ceased making payment as he claimed he was not getting any business from M.D. Sass Company. (Tr. 423.)

In April of 1994, Johnson was indicted for several offenses regarding his failure to pay income taxes and Union activities. Johnson agreed to testify about his activities and Glover's alleged involvement. (Tr. 210-14.) In exchange for his testimony, Johnson entered a plead to one count of Racketeering and three counts of Tax Evasion in exchange

for a sentence of 30 months. (Tr. 219.) Johnson also admitted to use of cocaine on a regular basis and abuse of alcohol. (Tr. 275, 532.)

At trial, the Government called several witnesses who served as trustees of the Funds to describe their roles in the Fund administration and the investments described by Johnson. (Tr. 675, 760, 798, 869.)

Lelis testified at trial that he first met Johnson in 1986. He introduced Johnson to a venture known as Coalstar which was being set up to mine coal in Indiana. (Tr. 622.) Lelis sought investors for Coalstar and reached an agreement for payment of finders' fees to be paid to him for any investors he located. (Tr. 626.)

In 1987, Lelis met with Johnson and suggested that C.D.T.U. invest in Coalstar. Lelis and Johnson negotiated payment to Johnson (who said he was splitting with Glover) $140,000. (Tr. 630.) In 1987, the Pension Fund purchased stock in Coalstar and Lelis was paid $331,000. He negotiated checks and paid $40,000 in cash to Johnson. (Tr. 650) In total, Lelis stated that he paid Johnson $135,000.

Bennett was called as a witness at trial and told the jury about her relationship with Johnson. Bennett testified that she became a stockbroker in 1984 and that she met Johnson in 1986. (Tr. 973.) She approached Johnson to sell him investment products marketed by her employer, Shearson Bros. (Tr. 980.) Bennett told the jury that she met Glover in Johnson's office. The C.T.D.U. Funds began making some investments through Bennett. As of January, 1987, approximately $1.9 million had been invested. In April of 1987, Bennett received a commission check for $48,000. She told the jury she believed she was going to lend $30,000 to a Mr. Simon. Frangos ("Frangos"). (Tr. 1006.) She assembled $30,000 in cash and met Johnson sat Ed Debevic's Restaurant. She gave the money to Johnson to give to

Frangos and as of 1995, did not know if Frangos ever got the money. (Tr. 1008.)

In 1988, Bennett was working for American Capital Equities and gave Johnson and Glover some information regarding real estate investments. Bennett set up real estate presentations for JMB Realty and Sierra. Bennett was given a broker of record letter by the Funds. (Tr. 1012-14.) In October of 1989, the Pension Fund agreed to invest in JMB Realty. On November 1, 1989, Bennett stated she met Johnson and Glover at the Italian Village Restaurant. (Tr. 1020.)

Bennett maintained that Glover talked about commissions and wrote numbers on a page of legal paper. He told her that she would have to pay part of her commission to him and Johnson. (Tr. 1022). Johnson told her that she could not tell anyone about this and not to mention Glover's name to anyone. (Tr. 1023.) When Bennett began receiving commissions, she got two checks each for $50,000. (Tr. 1031.) Bennett gave Johnson the two checks and $6,000 in cash at a meeting in a restaurant. Johnson had earlier made Bennett give him a ring. (Tr. 1032.)

Bennett later received six additional commission checks, totalling approximately $275,000. She gave three of the checks totalling $150,000 to Johnson. (Tr. 1035.) About two weeks later, Johnson called from California and stated that he needed $20,000 in cash. In February of 1990, Bennett alleged that she gave Johnson $60,000 in cash. (Tr. 1040.) The next month, Bennett alleged that she gave Johnson $90,000 and wrote herself a letter in which she outlined her payment of commission monies. (Tr. 1044.) Bennett believed she paid Johnson over $406,000. (Tr. 1049.)

In 1990, the Internal Revenue Service ("I.R.S.") contacted Bennett, who had not yet filed her 1988 tax return. Bennett was interviewed in the U.S. Attorney's Office, but did not

disclose the payments to Johnson. (Tr. 1053.) The U.S. Attorney revoked a proffer letter to Bennett, she later contacted an agent and asked to be re-interviewed. (Tr. 1058.) Bennett arranged to meet Johnson while wearing a tape recorder. Bennett later requested and receive immunity, she entered a plea agreement regarding two misdemeanor tax offenses. (Tr. 1073.)

The Government called Evoy as a witness. Evoy testified that he knew Johnson and that he had once received some legal advice from Glover. (Tr. 1159.) Evoy knew Wayne Gablin ("Gablin") who owned a currency exchange. Johnson asked Evoy to arrange to cash several checks in the approximate amount of $50,000. Evoy arranged to do so through Gablin's former employee, Carol Palmsone ("Palmsone") . Palmsone cashed the checks which bore the name "Susan Bennett" and Evoy gave the money to Johnson, keeping $2,250 for himself. (Tr. 1157.) This process was repeated and on each transaction, Palmsone was paid $500. (Tr. 1161.) Evoy cashed five checks for Johnson. (Tr. 1166.)

Palmsone was questioned by Government agents about the checks and she called Evoy who, in turn, met with Glover. Evoy said he told Glover that he could not reach Johnson and advised Glover of the check cashing. (Tr. 1176.) Johnson met Evoy and gave him the name of a lawyer for Palmsone and $1,200 for fees. (Tr. 1178.) Paimsone later requested a picture of Bennett from Evoy who passed the request on to Johnson.

Palmsone testified and described her conversations and actions in cashing checks for Evoy. (Tr. 1198-1207.) When initially questioned by agents, she lied and said Bennett cashed the checks. (Tr. 1210.)

Kathy Rugendorf ("Rugendorf") was called as a witness. She was Glover's former secretary. (Tr. 1229.) She described her duties as Glover's secretary. (Tr. 1220-37.) She also described Glover's schedule and a book in which she alleged he kept $100 bills. (Tr. 1260-65.)

The Government called David Nadell ("Nadell") as a witness. Nadell was a stockbroker and partner with Marolda. (Tr. 1363.) Nadell testified under a grant of immunity. In 1987, he worked with Marolda as an institutional stockbroker. (Tr. 1367.) They later established their own firm. When Marolda established a relationship with the C.T.D.U. Fund, he told Nadell that Johnson wanted money. (Tr. 1374.) Nadell identified bank records of cash withdrawals. (Tr. 1389.) Nadell and Marolda discussed the monies that Marolda passed to Johnson and Glover in exchange for stock orders through M.D. Sass. (Tr. 1392.)

Marolda was the Government's last witness at trial. He testified that he worked as a stockbroker and met Johnson in 1987. (Tr. 1416.) Marolda also testified under a grant of immunity. (Tr. 1418.) He told the jury that after meeting Johnson, he sought Union Fund investment work and Johnson agreed to provide such work in exchange for money. (Tr. 1420.) Marolda discussed kickbacks with Johnson and that he and Nadell decided to pay money to Johnson and Glover. (Tr. 1433.) Marolda stated that he paid money to Johnson in installments from $600 to $5,000. (Tr. 1442.) He stated he made about 36 payments and that he gave money to Glover on 10 occasions. (Tr. 1445.)

Following Marolda's testimony, the District Court allowed the Government to read certain portions of Glover's testimony from the first trial which had resulted in a hung jury. The Court denied a defense request to read the testimony in its entirety. (Tr. 1575, 1579.)

Both parties then rested. Following arguments and instructions, the jury convicted Glover on Racketeering and tax violations.

At sentencing, the Court enhanced Glover's guideline level by two (2) points on the basis that he perjured himself at the first trial. The Court sentenced Glover to 84 months of incarceration and three years supervised release. Pursuant to

the jury's forfeiture order, the Court ordered forfeiture of $325,000 and declined to impose additional Costs.

The defendant appeals from the conviction and sentence.

ARGUMENTS

I.

THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF HIS INCOMPLETE TESTIMONY FROM A PRIOR TRIAL

As noted earlier, this case was tried twice, the first trial resulted in a hung jury. Defendant testified at the first trial- and he elected to remain silent at the second. However, the Government successfully sought leave from the District Court to introduce parts of the defendant's testimony from the first trial, over the objection of defense counsel. (Tr. 1579-89.)

In response to the Government's proposal to read an edited version of some of the transcript, defense counsel requested leave to redact 30 pages of background information and read the entire remaining 120 pages of the transcript. The District Court denied that offer. (Tr. 1572.)

Federal Rule of Evidence 106 codifies the doctrine of completeness. The Rule provides that:

> Statements when a writing or recorded statement or part thereof is introduced by a party an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought to in fairness be considered contemporaneously with it.

Defendant argues that his request to admit the remainder of his testimony (except background information) was appropriate under the above Rule. *United States v. Walker*, 652 F.2d 708 (7th Cir. 1980)

We note that this Court will review the decision to deny that portion of the transcript under the standard of abuse of discretion. Defendant argues that the trial court's denial of the request was such an abuse of the safeguards provided by F.R.E. 106 which prevents a party from gaining an advantage by editing a prior statement. *United States v. Sweiss*, 814 F.2d

1208 (7th Cir. 1986) Portions of the remainder of defendant's testimony have been reproduced in Defendant's Appendix. These sworn statements could have been introduced at trial, along with those sections which the Government chose to read without any undue hardship.

Of course it would take time to read 120 pages of testimony, but, the use of time is not an appropriate criteria, for denying the applicability of F.R.E. 106 to the procedure employed by the Government.

The Government made the choice to introduce part of Glover's testimony. As the record reflects (Tr. 1579-90), the Government was allowed to select a small portion of the defendant's testimony, but that portion nonetheless described his involvement in the Coalstar transaction and Kemper investments (Tr. 1579), as well as the sale of bonds (Tr. 1583), and the prospectus for real estate transactions. (Tr. 1587.) This wide-ranging selection of topics by the Government made it almost impossible to select a few paragraphs here and there from the remaining testimony and to represent that these selections constituted "completeness" regarding the selected topics.

The trial court abused its discretion in this case as it failed to recognize the very purpose of the Doctrine of Completeness. The remainder of the transcript constituted evidence which ought to in fairness have been considered by the jury.

The District Court gave no reason for its denial of the request to read the remainder of the transcript in its entirety. The record reflects the following:

"THE COURT: He is not going to testify.
Okay. Well, then we will have to take a recess to check the parts of the transcript. Assuming they are allowed to use it, do you want parts read?

MR. MURTAUGH: Our position, I guess, is in its entirety.

THE COURT: You want it read in its entirety?

MR. MURTAUGH: The entirety.

THE COURT: That motion will be denied. If you have some specific parts of its that you want—

MR. BREEN: Then, Judge, whatever part they want to put in, if they are putting a name in or an investment in, then the entirety of his testimony regarding that name, his relationship to that party or investment should go in.

THE COURT: You have to be more specific than that. All right. You may read the parts you wish.

MR. ANDERSON: Okay.

MR. BUVINGER: Thank you, your Honor."

(Tr. 1566.)

The Court later ruled that the statements chosen by the Government constituted admissions dealing with Glover's Trust Fund activities and invited the defense to select portions which explained the Government's selected readings. (Tr. 1570.) This solution, however, does not comport with F.R.E. 106 because portions could not explain or clarify all of the topics covered by the Government's selection of topics.

At the first trial, Glover testified and did indeed deny his guilt. His explanations of the various conduct attributed to him and his background constituted approximately 100 pages on direct examination. In order to explain those particular acts to which he purportedly admitted fairness, required that he be allowed to submit testimony which reflected his explanations.

Nothing in F.R.E. 106 required that a consideration of fairness require a condensation of the explanation into a few passages.

The previously cited case of *United States v. Walker* dealt with a situation in which the Government submitted one-half of a defendant's testimony at a prior trial. As the Court noted in that case, the key consideration was not based upon how long it would take to introduce the evidence of explanation, but rather what was necessary to prevent an unfair one-sided presentation of evidence. *United States v, Walker,* 652 F.2d 708, 713 (7th Cir. 1980).

It is clear that the Rule does not require instruction of irrelevant testimony that explains nothing. *United States v. Soures,* 736 F.2d 87 (3d Cir. 1984). This would apply to defendant's background, however, defense counsel offered to redact that portion.

However, other portions of the earlier testimony clearly rebutted or explained certain evidence and actions. For example, the Government proffered Glover's testimony on Coalstar, he explained that testimony at pages 27-29, the jury never heard that explanation. Similarly, Bennett was discussed in the Government's selection of testimony, but Glover's testimony at pages 81-84 was never heard by the jury.

This problem could not be remedied by requiring defense counsel to edit his client's testimony into a choppy montage of topics which was made unclear by the absence of temporal continuity, or the organization of the earlier direct examination. The Government created this issue when it decided to pick-and-choose certain parts of the testimony. The District Court failed to exercise its discretion by flat-out denying the request to consider the entire transcript, less the background information. As a result, it left the defendant with a choice to leave an incomplete impression of the evidence for the jury or

to take the stand. By forcing such a choice, the District Court abused its discretion and defendant was denied a fair trial.

The District Court's error in refusing to admit the complete testimony from the first trial denied defendant a fair trial. This matter should be reversed and remanded.

II.

THE DISTRICT COURT ERRED IN ENHANCING DEFENDANT'S SENTENCE UPWARD AS A RESULT OF TESTIMONY AT A PREVIOUS TRIAL

At the sentencing hearing in this case, the District Court enhanced defendant's sentence two (2) levels on the basis of Obstruction of Justice. The enhancement was based upon the determination that Glover had perjured himself at the first trial, which resulted in a hung jury.

Initially, we note that this Court will review a sentence under the guidelines under the standard of clear error regarding factual determinations and *de novo* concerning guideline interpretations. *United States v. Hubbard*, 929 F.2d 307 (7th Cir. 1991). Defendant argues that the two point enhancement of his sentence in this case was clearly erroneous. The following occurred at the sentencing hearing:

"THE COURT: I am going to decline to add two points for obstruction of justice. You may go on to discuss the perjury aspect of the case.

MR. ANDERSON: With regard to the perjury, it's the position of the United States—and we are prepared to go through the transcript line for line. In preparing for this hearing we did sit down and look at the transcript, and we found at least 39 areas in which the defendant committed specific lies based upon the jury's finding.

THE COURT: What about the fact that the first trial resulted in a hung jury? What impact does that have on the fact—and he didn't testify at the second trial? What impact does that have on the proceedings?

MR. ANDERSON: Well, I think perhaps there would have been a conviction at the first trial if he had not testified. The perjury contributed to justice not being accomplished. It's very possible that the one juror held that, based on his perjurious testimony which they believed to be true, that he did not commit the offenses.

THE COURT: Well, the broader question is, is perjury anywhere in the proceedings a matter to be taken into account? In other words, is the book closed on the first trial when you have a mistrial? That's the issue really.

MR. ANDERSON: We didn't find any case law that specifically addressed that, but I think you have to look at the entire picture. The entire picture is that there was obstruction of justice base [sic] on the perjury. That is, during his first trial he took the stand, told lies in an attempt to obstruct the process in order that the truth would not be revealed.

THE COURT: Well, there is a case called United States versus Lueddeke, 908 F.2d 230, Seventh Circuit 1990, where perjury before a grand jury was taken into account.

There is another case that comes pretty close to it, Stout versus United States, 935 F.2d 433. The defendant lied at the first trial which ended in a hung jury. Defendant later pled guilty to a lesser offense, and the judge enhanced the

sentence based on perjury at the first trial.

So I think analytically, unless you have some other cases, Mr. Murtaugh, on the point, analytically the government is on sound ground in urging the consideration of whether or not perjury occurred at the first trial.

MR. MURTAUGH: Well, I don't know how the government can stand here, your Honor, and tell your Honor that what was said in that first trial was perjurious. What they are actually asking—

THE COURT: Well, we haven't gotten to that level yet. We are going to get to that in a minute. The first question is whether or not it can be considered. My research independent of your—you gave me no cases.

There is one other case, a Second Circuit case, U.S. versus Valdez, 16 F.3d 1324, a 1994 case, where perjury of a witness was taken into account, again, in separate proceedings.

So I think the fact that it was in a separate proceeding or a mistrial does not preclude the Court from considering whether or not perjury occurred at the first trial.

I am prepared to say, based on my own independent review of the testimony of the defendant at the first trial, that perjury was presented to this jury at the first trial. I am obliged under circuit

law, the recent Briscoe case and others, to say particularly where I think the perjury occurred because you have a right to respond to it or comment on it.

I believe that the first instance and probably the most blatant instance of perjury was Mr. Glover's statement that he never directed Wolf, Webb, Burke & Campbell to purchase Coalstar stock. He clearly wrote the letter which directed them to do that. Then he described the letter as merely something call a 'pimp.' It was, I think, a blatant piece of perjury at the first trial when he was confronted with the letter and its content to so describe it, in light of all the evidence, was in my judgment clearly perjury and certainly by a preponderance of the evidence.

The second instance which I think is significant, if other instances are necessary, if Mr. Glover's testimony that the money he received from Marolda was the repayment of—he thought—the repayment of a loan that Johnson had made to Marolda and Nadell. Without regard to Johnson's testimony, of course, he testified he made no such loan, but for Mr. Glover to so describe that payment as repayment of a loan was another instance of blatant perjury.

Perhaps the third instance, although, again, I am not sure a third instance is necessary, his description of the Italian

Village luncheon in which he denied any discussion of kickbacks I think was another instance of blatant perjury.

His description of—his contradiction of the testimony of Kathy Rugendorf, who was clearly testifying here in a truthful manner, again is an instance of perjury by Mr. Glover at the first trial.

So, I find that a perjury adjustment is proper in this case. Therefore, I add two points to the two levels to the offense of kickbacks charging the defendant with receiving kickbacks that it was a part of a racketeering conspiracy.

MS. EHRLICH: Judge, is that regular two points or upward departure?

THE COURT: Two points. It will add two. Adjustment for perjury will enhance the level by wo levels, and that will produce a level 26 with respect to the kickback aspect of the case.

(Sentencing Hearing, 9/21/95, pp. 6-10.)

Section 3C1.1 provides that a sentence may be enhanced by two levels:

> "if the defendant willfully obstructed or impeded or attempted to obstruct or implied the administration of justice during an investigation, prosecution or sentencing of the instant offense."

U.S.S.G., § 3C1.l.

The District Court based its ruling upon certain specific portions of Glover's testimony at the first trial. The Court referred to certain specific portions of Glover's testimony and characterized them as perjury:

(1) Defendant's denial of directions to Wolf, Webb, Burke & Campbell to purchase Coalstar stock;

(2) The receipt of money from Marolda and Nadell with the belief that it was the repayment of a loan from Johnson;

(3) Defendant's description of his meeting with Bennett and Johnson at the Italian Village; and

(4) His contradiction of the testimony of Rugendorf.

Based upon these four instances, the Court found a perjury adjustment to be appropriate. We argue that this determination was clear error. This determination is not supported by the appropriate factual basis in the record. While Glover testified at the first trial, he did not act in any manner to impede the administration of justice by exercising his Constitutional right to testify and testifying contrary to the Government's witnesses.

District courts are prohibited from enhancing sentences merely because a jury returned a guilty verdict. *United States, v. Lozoya-Morales*, 931 F.2d 1216, 1218 (7th Cir. 1991).

In each of the circumstances cited by the District Court, the Court made a credibility determination that it did not believe the defendant's version of an event. With regard to each version of the event, Glover did no more than deny his guilt by providing his version of what occurred.

This situation is clearly distinguishable from that in a case cited by the District Court, *United States v. Stout*, 936 F.2d 423 (9th Cir. 1991). In *Stout* the defendant testified at his first trial that he was unaware that a counterfeit bill was counterfeit until he was arrested. Later, it was proven that after his arrest, he attempted to dispose of a second bill in his possession. *Stout*, unlike *Glover*, received the enhancement on the additional basis that during his detention and subsequent investigation, he attempted to conceal and destroy

evidence. Nothing in this record suggests such conduct by Glover. Thus, the District Court erred in concluding that Glover had impeded the administration of justice by denying his guilt at the first trial.

Certainly, this qualifies as a close case and one which allows the testifying defendant to have the benefit of the doubt which the guidelines give him. *United States v. Jones*, 983 F.2d 1425, 1431 (7th Cir. 1992). This record, unlike that in *Jones*, reflects no plausible evidence from which the Court can infer that Glover's testimony was necessarily perjury. The fact that Glover put the Government's case to a credibility test in the first case, does not support the determination that he lied to obstruct justice.

The specific instances listed by the trial court as perjury all relate to testimony by Glover as to an explanation of his actions (the letter and Marolda envelope), or his version of what was said in a conversation (Bennett and Rugendorf). Just because a jury convicted defendant, despite his testimony, does not support the conclusion that the jury necessarily disbelieved him.

It should be noted that Glover denied splitting money with Johnson and yet the jury convicted him. Yet the Court did not find this testimony to be perjury. Thus, no rational distinction exists between the specific instances cited by the District Court and the remainder of Glover's testimony and, under these facts, was it any more than an exercise of a constitutionally guaranteed right to take the stand and deny the allegations against Glover.

Every single Government witness that testified to illegal transactions or conversation with defendant was impeached or admittedly lied at some point during the investigation. The fact that Glover chose to dispute the testimony of these individuals does not in-and-of itself make his version of those events perjury.

The record in this case doe not support the conclusion that the specific testimony selected by the trial court was perjury, thus no basis existed to support the two point enhancement.

When the record contains insufficient evidence to support a guideline interpretation which leads to an enhancement, the matter should be remanded for re-sentencing. *United States v. Polland*, 994 F.2d 1261 (7th Cir. 1993).

As the record in this case does not support the enhancement of defendant's sentence for perjury, this matter should be reversed and remanded for re-sentencing.

CONCLUSION

For the reasons stated herein, defendant, PAUL GLOVE, respectfully requests this Honorable Court to reverse, or in the alternative, reverse and remand his conviction and sentence.

DATED this 15th day of April, 1996.

Respectfully submitted,

/s/ George J. Murtaugh, Jr.
GEORGE J. MURTAUGH. JR.

/s/ Thomas M. Breen
THOMAS M. BREEN

GEORGE J. MURTAUGH, JR.
100 W. Monroe Street
Suite 1800
Chicago, IL 60603
312/781-0940

THOMAS N. BREEN
MARTIN, BREEN & MERRICK
53 W. Jackson Blvd., Suite 1460
Chicago, IL 60604
312/360-1001

Attorneys for Defendant-
Appellant, PAUL GLOVER

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

No. 95-3346.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL L. GLOVER,
Defendant-Appellant.

Argued Sept. 13, 1996.
Decided Dec. 2, 1996.

Before CUDAHY, KANNE and ROVNER, Circuit Judges.

ILANA DIAMOND ROVNER, Circuit Judge.

At the close of his second jury trial, Paul L. Glover, formerly the Vice-President and General Counsel of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) (CTDU or the Union), was convicted of numerous federal offenses arising from a series of investments that he arranged to be made with money from the Union's pension and health and welfare funds. Glover entered into these transactions on the Union's behalf for the purpose of obtaining kickbacks for himself and others. He was sentenced to one term of 84 months in prison and two terms of 36 months in prison for his role in these schemes, the terms set to run concurrently and to be followed by three years of supervised release. In addition, Glover was required to forfeit $325,000 to the United States and to pay the costs of his prosecution. Glover's first trial, at which he testified in his own defense, resulted in a mistrial due to the jury's inability to reach a verdict. Although Glover then chose not to take the

stand at his second trial, the district court permitted the government to introduce a select portion of the transcript of Glover's testimony from his first trial, rejecting Glover's request that essentially all of his prior testimony be admitted in order to clarify the portion that was presented to the jury. Fed.R.Evid. 106. In this appeal, Glover contends that the district judge abused his discretion in doing so, and that the judge's ruling deprived him of his right to a fair trial. Glover also assails the district judge's decision to increase his base offense level under the Sentencing Guidelines by two levels for obstruction of justice, U.S.S.G. § 3C1.1, on the ground that his testimony at his first trial was perjurious. We affirm.

I. BACKGROUND

The CTDU is a national labor union with over 5,000 members, most of whom are truck drivers, dock workers and warehouse workers residing in the Chicago area. John R. Johnson, Sr., served as its President, and Glover as its Vice-President and General Counsel during all times relevant to this case. Glover was Fund Manager of the Union's Health and Welfare Fund, as well as a member of its Board of Trustees, and was responsible for managing the Fund's day-to-day operations. Glover was not, however, authorized to make investment decisions concerning the Health and Welfare Fund's assets on his own, as such decisions were to be made only under the direction of its full Board of Trustees. The CTDU Pension Fund was also administered by a Board of Trustees, which retained two money managers to provide it with investment advice. Pension Fund investments could only be authorized by a majority vote of its Board. Johnson held the position of Fund Manager of the Pension Fund and served with Glover as one of its trustees. The American National Bank of Chicago, Illinois, was one of the two money managers of the Pension Fund entrusted with reviewing its investments. Between October 1986 and July 1987, Wolf, Webb, Burke & Campbell (Wolf, Webb) of Philadelphia,

Pennsylvania, served as the Fund's second money manager, but later resigned and was replaced in August of 1987 by M.D. Sass of New York City.

During the latter part of 1986 and early 1987, Johnson met several times with John Lelis, a commercial mortgage broker who suggested that the Union invest its funds in Coalstar Enterprises, a coal mining project in northern Indiana. Lelis sought to obtain two million dollars in investments for the project, and was willing to offer a kickback of a portion of his commission if Johnson could arrange to invest the sum. Johnson then met with Glover and told him about the arrangement, and Glover proposed that they obtain the money by convincing the Pension Fund money managers to purchase Coalstar stock. Glover first approached an investment manager at American National Bank and tried to persuade him to approve the investment, but was summarily rebuffed. Glover then arranged a meeting between himself, Lelis, Johnson, and representatives of American National Bank for the purpose of reviewing a presentation by Coalstar describing its coal mining venture in the hope of convincing them to approve the investment. American National Bank again refused, characterizing the venture as high-risk and unsuitable as an investment for the Pension Fund. At a similar meeting held the following day, Wolf, Webb reached the same conclusion. Wolf, Webb soon resigned as money manager of the Pension Fund, in part because of a letter drafted by Glover that directed Wolf, Webb to make the Coalstar investment.

At this juncture, Glover decided to raise the money for the investment by selling some of the Pension Fund's bonds, worth approximately one million dollars, that were being held by the Mid-City National Bank. Glover then drafted, and Johnson signed, a letter that directed the bank to transfer the bonds to Dean Witter Reynolds, which subsequently sold them prior to their maturity date at a loss of over $195,500 to

the Pension Fund. Glover and Johnson then invested the proceeds from the sale in Coalstar stock without advising the Pension Fund's Board of Trustees of their actions, despite the fact that all such sales and investments of Pension Fund assets had to be approved by the Board. Nor was the Board informed of the loss that had been incurred when the Pension Fund's bonds were sold before their maturity. In June and July of 1987, Lelis met three times with Johnson and gave him a total of approximately $135,000 in cash, which Johnson divided equally with Glover. Glover did not apprise his income tax preparer of the money he received in kickbacks, and failed to report the income on his federal income tax return.

In late 1986, Johnson and Glover also entered into a similar scheme with Susan R. Bennett, a stock broker who met with Johnson to recommend various investments for the Union's assets. After Bennett agreed to give a portion of her commission to Johnson, Johnson and Glover met with her on several occasions to discuss possible investments for Union funds. In mid-January 1987, Johnson and Glover invested a total of approximately $1.95 million from the Union's Health and Welfare Fund in Putnam High Income Government Trust, a mutual fund, through Bennett. In early March of the same year, Johnson and Glover made an additional investment of over $4.6 million from the Fund in Kemper-Government Plus Portfolio funds, also through Bennett. Both investments were made without the knowledge or approval of the Board of Trustees of the Health and Welfare Fund. The Kemper investment required the sale of U.S. Treasury notes before their maturity, which was accomplished at Glover's direction, without a vote of the Board of Trustees. Shortly after receiving her brokerage commission from these transactions, Bennett met with Johnson at a local restaurant and gave him $30,000 in cash. Johnson shared the kickback with Glover, each taking $15,000.

In 1989, on the recommendation of an advisory association of pension fund trustees, the Board of Trustees of the Pension Fund began to consider placing approximately ten to fifteen million dollars of the Fund's money in real estate investments. Johnson then spoke with Bennett to confirm that she was still willing to pay kickbacks from the commissions she would earn by brokering the investment of Union monies. After Bennett agreed to make the kickbacks, Glover told Johnson to have Bennett arrange a presentation by several real estate investment firms to be made at a meeting of the Board of Trustees. Johnson and Glover told Bennett not to attend the meeting, and failed to advise the Board of Bennett's role in arranging the presentation or that she would be brokering the proposed transactions. The Board ultimately voted to invest five million dollars in each of two Sierra Capital funds, and five million dollars in a J.M.B. Realty fund. Although the Board authorized these investments, it was never informed that Bennett would be appointed broker of record on its behalf, or indeed that anyone would be paid a commission from the money it had allocated for the investments.

On November 1, 1989, Glover, Johnson and Bennett met for lunch at the Italian Village Restaurant in Chicago to discuss the division of Bennett's brokerage commission. At the meeting, Glover and Johnson made it clear to Bennett that she would be required to give them approximately $400,000 from the commissions she would receive for brokering the three transactions, that in the future she would only meet with Johnson in order to make the kickback payments, and that harm would come to her and her family if she ever mentioned Glover's name or told anyone of the kickback scheme. Bennett began receiving commission checks in late November 1989, and met with Johnson on several occasions to relinquish them. On or about November 29, 1989, Bennett gave Johnson two checks for $50,000 each, which she had endorsed over to Johnson, as well as $6,000 in cash. Bennett

again met with Johnson in late January 1990, and gave him three more checks totalling $150,000. All of the checks were eventually cashed at a currency exchange by Timothy Evoy, an acquaintance of Johnson's, for a fee of $2250 per check. A third meeting between Bennett and Johnson took place around February 10, 1990, during which Bennett gave Johnson a paper bag containing $60,000 in cash. A fourth meeting was arranged for the end of February, and Bennett made a final kickback payment of $90,000 in cash to Johnson. Apart from the $6,000 in cash Bennett bad paid to Johnson at their first meeting, which Johnson retained for himself, Johnson shared one-half of all the other proceeds from the kickback scheme with Glover. In other words, Glover received a total of $194,375 in kickback payments from Bennett's commissions for brokering the Union's Sierra Capital fund and J.M.B. Realty fund investments. Glover did not, of course, report this income on his federal income tax returns.

After Wolf, Webb resigned in August 1987 from its position as one of the two money managers of the Pension Fund, Glover and Johnson decided to find a replacement. At that time, Glover and Johnson were already acquainted with Ronald Marolda. Marolda met with Johnson and suggested that the Pension Fund appoint M.D. Sass of New York as its money manager. Marolda told Johnson of his plans to start a brokerage firm with a licensed broker named David Nadell, and assured Johnson that he would be willing to make kickback payments if the Pension Fund would agree to place its investments through his firm. Johnson reported this conversation to Glover, who thought they should demand a lump-sum kickback payment from Marolda for having M.D. Sass appointed as the Pension Fund's money manager. After Marolda told Johnson that this would be impossible, but that he and Nadell would agree to make kickback payments from all future commissions they received for the purchase and sale of stocks and bonds on behalf of the Pension Fund and

other investors holding accounts with M.D. Sass, Glover agreed to the arrangement. By the end of August 1987, the Pension Fund retained M.D. Sass as its new money manager. Marolda and Nadell soon began dividing the commissions they obtained from the trades that were executed, at first by Nadell alone, and later by their brokerage firm, at the direction of M.D. Sass. Marolda then started making regular kickback payments drawn from those commissions.

Between the end of 1987 and January of 1992, Marolda made at least thirty-six kickback payments to Johnson and Glover. All of these were cash payments that Marolda usually turned over to Johnson, who then divided the money equally with Glover. For a period of approximately eight months in 1990 and 1991, Marolda did not, however, make any payments. Johnson soon retaliated by directing a representative of M.D. Sass to stop doing business with Marolda's brokerage firm. Marolda then requested a meeting with Glover and Johnson to explain why he had failed to make the kickbacks. At the meeting, which was held at a private club in downtown Chicago, Marolda asserted that he had not earned any commissions from M.D. Sass for about eight months because he had not traded on accounts held by M.D. Sass during that time. Marolda also gave a detailed description of how the commission structure at his brokerage firm worked, and how he arrived at the sum that he eventually turned over to Johnson and Glover. Glover was apparently satisfied with Marolda's explanation of the lapse. After the meeting, Marolda continued to broker transactions made on the Pension Fund's account and began paying kickbacks from his commissions exclusively to Glover, who then assumed the task of dividing the proceeds with Johnson. A total of approximately $100,000 changed hands in this scheme, with Glover's share amounting to one-half that amount. Glover again failed to report the kickback payments on his federal income tax returns.

On January 19, 1995, a federal grand jury returned a twenty-two count indictment against Glover, charging him with conspiracy to conduct the affairs of the CTDU and its Pension and Health and Welfare Funds through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d) (Count One); soliciting and receiving kickbacks relating to the investments made on behalf of these Funds in violation of 18 U.S.C. § 1954 & 2 (Counts Two through Four and Eight through Eighteen); money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) & 2 (Counts Five and Six); corruptly influencing and attempting to influence the testimony of a witness before the grand jury in violation of 18 U.S.C. § 1512(b)(1) & 2 (Count Seven); and filing false United States Individual Income Tax Returns for the taxable years 1988, 1989, 1990 and 1991 in violation of 26 U.S.C. § 7206(1) (Counts Nineteen through Twenty-two). The indictment also alleged that Glover's property was subject to forfeiture to the federal government because Glover had gained approximately $338,325 from his racketeering activities, and also because he had arranged for $150,000 of the proceeds from several of the kickbacks to be laundered to disguise their illegal source.

Glover's first trial began on April 17, 1995. At trial Glover testified in his own defense concerning, among other things, his role in selecting the Coalstar investment, his choice of Bennett to broker a series of investments for the Health and Welfare Fund, and his role in directing the sale of a number of bonds and federal treasury notes in the Union's portfolio before maturity. On May 8, 1995, the jury declared itself deadlocked, and the district judge ordered a mistrial. The judge then ordered Glover to be retried, and his second trial began on June 5, 1995. This time, Glover elected not to take the stand. The government nevertheless offered a portion of the transcript of Glover' s testimony from the first trial over Glover's objection. According to Glover, Federal Rule of Evidence 106 required that nearly all of his prior testimony be

entered as evidence in the second trial, or, alternatively, that the entire testimony be excluded. See Fed.R.Evid. 106. After several invitations to Glover's counsel to specify exactly which parts of the transcript of Glover's testimony should in all fairness be read to the jury, and counsel's continued insistence that essentially all be included, the district court overruled Glover's objection. On June 22, 1995, the jury returned a verdict finding Glover guilty of all but Counts Seven and Eleven through Thirteen of the indictment, which involved one instance of witness tampering and three instances of soliciting or receiving kickbacks, respectively. The jury also returned a special verdict requiring Glover to forfeit a total of $325,000 to the government. The district judge then ordered the preparation of a presentence report and set September 21, 1995 as the date for Glover's sentencing.

At Glover's sentencing hearing, the district judge determined that for purposes of calculating Glover's base offense level under the Sentencing Guidelines, the eleven counts of soliciting and receiving kickbacks, the two counts of money laundering, and the four counts of income tax evasion should each be grouped separately. *See* U.S.S.G. § 3D1.2(d). Glover's base offense level was thus set at 24. The judge then considered whether the base offense level should be increased by two points for obstruction of justice under U.S.S.G. § 3C1.1 on the ground that Glover had committed perjury during his first trial. *See* U.S.S.G. § 3C1.1, comment. (n.3(b)). After carefully reviewing the transcript of Glover's testimony from his first trial, the judge determined that Glover had perjured himself on at least four occasions. The particular examples of perjury that the judge cited were Glover's testimony that he never directed Wolf, Webb to purchase Coalstar stock, his testimony that the money he obtained from Marolda represented the repayment of a loan that Johnson had made to Marolda and Nadell, and his testimony that he never discussed kickbacks with Bennett at the Italian Village luncheon held on November I, 1989. The

judge also noted that Glover's testimony had generally contradicted that of his secretary, and that her testimony was clearly credible. (Sentencing Tr. at 8-9.) Glover's offense level was thus increased by two points to 26, and adjusted further to 28 to reflect the fact that his offenses fell into more than one group of closely related counts. *See* U.S.S.G. § 3D1.4. This offense level yielded a sentencing range of 78 to 97 months. The judge then sentenced Glover to one term of 84 months in prison on the racketeering conspiracy and money laundering counts, and two terms of 36 months in prison on the counts involving kickbacks and income tax evasion, all three terms to be served concurrently. Glover was also ordered to forfeit $325,000, and to pay $16,811.84 to the government to cover the cost of his prosecution. In addition to requiring Glover to serve a three-year term of supervised release, the judge barred Glover from becoming involved in any labor organization (other than as a simple member) for a period of thirteen years after his release. *See* 29 U.S.C. § 504.

II. DISCUSSION

Glover maintains that the district court abused its discretion in admitting into evidence a portion of the transcript of his testimony from his first trial, then denying his request to admit nearly all of that testimony for the purpose of placing it in a proper context as required by Rule 106. Glover further asserts that by allowing the jury to receive an incomplete and misleading picture of his prior testimony, the court deprived Glover of his right to a fair trial. Glover thus maintains that his conviction should be overturned. The government contends, however, that when the district court called upon Glover to specify the portions of his previous testimony that clarified or placed in context those portions submitted by the government, Glover made a strategic decision to insist that nearly all of his prior testimony be read to the jury. According to the government, there was no abuse of discretion when the judge asked Glover to indicate which parts of the transcript

should be entered into evidence, then rejected Glover's request to admit essentially the whole transcript.

Federal Rule of Evidence 106, which stems from the common law doctrine of completeness, provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed.R.Evid. 106. Under the Rule, a party against whom a fragmentary statement is introduced may demand that any other part of the statement be admitted as would be necessary to clarify or explain the portion already received, and thus to avoid any misleading impression that would be created by offering the statement outside its true context. *E.g., United States v. Haddad,* 10 F.3d 1252, 1258-59 (7th Cir. 1993); *United States v. Lewis,* 954 F.2d 1386, 1391 (7th Cir.1992); *see also* Fed.R.Evid. 106 advisory committee's note. It is thus clear from the Rule's underlying purpose that the right to have some other portion of a statement admitted as evidence contemporaneously with the portion already received is not unqualified; indeed, the proponent of the additional evidence sought to be admitted must demonstrate its relevance to the issues in the case, and must show that it clarifies or explains the portion offered by the opponent. *United States v. Sweiss,* 814 F.2d 1208, 1211 (7th Cir. 1987) (quoting *United States v. Walker,* 652 F.2d 708, 710 (7th Cir.1981)) (internal quotations omitted); *see Lewis,* 954 F.2d at 1391; *United States v. Velasco,* 953 F.2d 1467, 1474-75 (7th Cir. 1992); *United States v. LeFevour,* 798 F.2d 977, 981 (7th Cir.1986).

As we explained in *Velasco,* the test of admissibility under Rule 106 is conjunctive. Thus, once the proponent of the evidence establishes its relevance, the district court must address the second part of the test, and should do so by asking

(1) whether the additional evidence explains the evidence already admitted; (2) whether it places the admitted evidence in its proper context; (3) whether its admission will serve to avoid misleading the trier of fact; and (4) whether its admission will "insure a fair and impartial understanding of all of the evidence." *Velasco*, 953 F.2d at 1475; *see Haddad*, 10 F.3d at 1259; *Sweiss*, 814 F.2d at 1211-12. The district court is, moreover, accorded considerable discretion in determining the admissibility of the additional evidence offered under Rule 106, and its decision will not be disturbed absent an abuse of discretion. *E.g.*, *Lewis*, 954 F.2d at 1392; *Velasco*, 953 F.2d at 1475.

On June 15, 1995, during the course of Glover's retrial, the government informed both Glover and the court of its intention to introduce part of the transcript of Glover's testimony from his first trial. The following day, the government provided Glover's counsel with the specific portion of Glover's testimony that it intended to introduce, which amounted to approximately eleven pages of the transcript of Glover's cross-examination, drawn from a total of 198 pages of prior testimony. On the morning of June 19, 1995, the government presented the district judge with the excerpts from Glover's testimony from his first trial, informing the judge that it would not seek to introduce the testimony if Glover were willing to testify at the retrial. The judge asked Glover's counsel if there were portions of Glover's testimony that he wanted introduced contemporaneously with the eleven pages selected by the government. Counsel responded that the entire transcript of Glover's testimony should be admitted, lest the jury be misled by certain responses that the defense believed the government had taken out of context. At the close of the morning session, counsel reiterated his request that Glover's entire testimony be admitted.

During the afternoon session of June 20, 1995, after the government's final witness had testified, Glover's counsel

announced that Glover would not take the stand. At a sidebar conference, the government indicated that it would offer the excerpts of Glover' s testimony from the first trial and Glover objected. The following colloquy then took place:

> THE COURT: He is not going to testify. Okay. Well, then we will have to take a recess to check the parts of the transcript. Assuming they are allowed to use it, do you want parts read?
>
> [DEFENSE COUNSEL]: Our position, I guess, is in its entirety.
>
> THE COURT: You want it read in its entirety?
>
> [DEFENSE COUNSEL]: The entirety.
>
> THE COURT: That motion will be denied. If you have some specific parts of it that you want—
>
> [DEFENSE COUNSEL]: Then, Judge, whatever part they want to put in, if they are putting a name in or an investment in, then the entirety of his testimony regarding that name, his relationship to that party or investment should go in.
>
> THE COURT: You have to be more specific than that.
>
> [DEFENSE COUNSEL]: I think we should have argument on what they are offering.
>
> THE COURT: No. I told you if you want me to consider whether parts of it to [sic] clarify or explain are admissible, I will do that. But you just said to me no, you want it all read. I will give you a blanket ruling. I am not going to require them to read it all.
>
> (Retrial Tr. at 1566-67.)

The judge then called for a recess to allow Glover's attorneys to consider whether they wanted to offer specific parts of Glover's prior testimony. Counsel's suggestion that

the first thirty pages be summarized as background information and that the remaining 168 pages be read to the jury was rejected, the judge explaining that "you are entitled certainly to offer any part which you think is necessary to fully understand what [the government is] offering, but that's all." (*Id.* at 1572-73.) The trial later resumed with the government's introduction, over Glover's continued objection, of the eleven pages of Glover's prior testimony.

As this lengthy exposition clearly demonstrates, rather than acceding to the judge's request that he select the portions of his prior testimony that clarified or explained the portions offered by the government, Glover was steadfast in his insistence that the entire transcript, less thirty pages of background information, be read to the jury. In determining whether the judge abused his discretion in refusing Glover's offer, we must therefore consider whether the materials offered by Glover meet our criteria for admissibility under Rule 106. As discussed above, this requires a showing by Glover that the entire transcript is relevant to the issues in the case, and that it qualifies or explains the excerpts offered by the government. *E.g., Velasco,* 953 F.2d at 1474-75. Even at this juncture, however, Glover makes a blanket statement that a selection of pages from the transcript would have been insufficient to insure a fair appraisal of all the evidence, yet he fails to demonstrate that the entire transcript is relevant to the issues raised in this case, *see id.,* or that only the entire transcript, rather than selected portions of it, would have sufficed to qualify or explain the excerpts that were introduced by the government, *see id.* at 1475. Indeed, by citing several examples of short passages from the transcript that Glover maintains would have clarified some of the testimony introduced by the government, Glover undermines his own argument that the court abused its discretion in refusing to allow the entire transcript to be read to the jury.

Glover nevertheless contends that the judge abused his discretion in refusing to admit the entire transcript because he

allowed an impermissible consideration to enter into that decision, namely, that it would have taken a long time to read the transcript to the jury. Insofar as Glover maintains that considerations of time should play no role in a judge's decision whether to admit additional evidence under Rule 106, he is mistaken. As this court most recently explained in *Lewis,* the district court's exercise of discretion under Rule 106 would involve

> weighing . . . the adequacy of the repair work necessary to correct any potentially misleading impression caused by an incomplete presentation against the waste of time and attention and the unfairness involved in blunting the proponent's presentation of his case when everything is required to be read at one time.

Lewis, 954 F.2d at 1392 (quoting *Walker,* 652 F.2d at 713 (7th Cir. 1981), and 1 Jack B. Weinstein et al., Weinstein's Evidence para. 106[01] at 106-7 (1979)) (internal quotations omitted). As discussed above, in deciding whether additional evidence should be admitted under Rule 106, a district court must consider, among other things, whether it will "insure a fair and impartial understanding of all of the evidence" in the case. *Velasco,* 953 F.2d at 1475. The amount of time needed to present the additional evidence, although obviously not dispositive, is one factor to be weighed in determining whether faimess requires the evidence to be admitted. *See Lewis,* 954 F.2d at 1392; *Walker,* 652 F.2d at 713-14. It is thus unsurprising that, as one commentator observed, "[a] court is more likely to find that fairness requires completeness when the requesting party wants one more line read, than where he is insisting that twenty additional documents must be introduced." 21 Charles Allen Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence §5077 at 369 (1977).

Glover does, however, raise a more compelling point. He maintains that in a criminal trial, a district court should not

allow the fact that a significant amount of time would be needed to present the additional evidence to take precedence over considerations of fundamental fairness, particularly where the defendant is then confronted with the dilemma of allowing the jury to hear an incomplete picture of the evidence, or of waiving his Fifth Amendment privilege not to testify in order to correct the mistaken impression created by the incomplete evidence. *See Walker*, 652 F.2d at 713-14. Glover is correct that, in assessing whether "fairness" under Rule 106 requires the admission of additional evidence offered by a criminal defendant, a district judge should be sensitive to the defendant's right to present evidence on his own behalf, as well as his right not to testify. *See id.* (noting that defendant was powerless to remedy distorted picture of his prior testimony without relinquishing his right not to take the stand); *see also United States v. Sutton*, 801 F.2d 1346, 1369-70 (D.C. Cir. 1986) (because defendant had constitutional right not to testify, excluded portions of recorded conversation were necessary to rebut government's case, and should have been admitted). As appealing as Glover's argument may be in the abstract, however, in this case he has failed to point to any tangible evidence that he was denied a fair trial because the district judge refused to admit the entire transcript of his earlier testimony. Indeed, Glover has failed to show how the record supports the basic premise underlying his argument, namely, that the judge excluded the transcript merely because of its length, without taking into consideration the impact of that ruling on the fairness of Glover's trial. As we have already observed, Glover has not even demonstrated that the threshold criteria for Rule 106 admissibility, such as relevance, were met here. *Cf., e.g., Walker*, 652 F.2d at 710, 713 (defendant established threshold criteria for admission of proffered evidence); *Sutton*, 801 F.2d at 1369 (same). For a stronger reason, then, his claim that he was denied a fair trial because the judge wrongly excluded Rule 106 evidence proves to be wholly unfounded. We

therefore conclude that the judge did not abuse his discretion in denying Glover's request to admit the entire transcript of his testimony from his first trial into evidence at his retrial, and that the judge's ruling did not deprive Glover of his right to a fair trial.

Glover also challenges the district judge's-decision to increase his base offense level by two levels under U.S.S.G. § 3C1.1 on the ground that he perjured himself during his first trial. Glover asserts that the judge erred in applying this enhancement because his finding of perjury was not supported by an adequate factual basis in the record, and that in a "close" case, such as he maintains this to be, the application of the enhancement effectively punishes a defendant for exercising his right to testify contrary to the government's witnesses. The government contends that the district court made the required independent review of the record, and that its factual findings were amply supported by documentary evidence and by the testimony of several witnesses whom the court expressly found to be credible. As with other factual determinations under the Sentencing Guidelines, we review the district court's findings with respect to the obstruction of justice enhancement only for clear error. *United States v. Romero*, 57 F.3d 565, 573 (7th Cir. 1995); *United States v. Mounts*, 35 F.3d 1208, 1219 (7th Cir. 1994), *cert. denied*,—U.S.—, 115 S.Ct. 1366, 131 L.Ed.2d 222 (1995).

Section 3C1.1 of the Sentencing Guidelines provides for a two-level increase in base offense level where a defendant has willfully obstructed or impeded the administration of justice during the prosecution of the offense for which he is being sentenced, *see* U.S.S.G. § 3C1.1, and Application Note 3 lists perjury as one example of conduct that will support an obstruction of justice enhancement. U.S.S.G. § 3C1.1, comment. (n.3(b)). The guideline thus applies to a case where the defendant testifying under oath has provided "false

testimony at his own trial 'concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.' " *United States v. Johnson-Dix*, 54 F.3d 1295, 1311-12 (7th Cir. 1995) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 1116, 122 L.Ed.2d 445 (1993)). As the Supreme Court explained in *Dunnigan*, where a defendant objects to the imposition of this enhancement on the basis of his trial testimony, the district judge "must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice" under this definition. 507 U.S. at 95, 113 S.Ct. at 1117. In applying this standard to *Dunnigan*, the Supreme Court then determined that the district judge's imposition of the enhancement was well supported in light of "the numerous witnesses who contradicted [Dunnigan] regarding so many facts [about] which she could not have been mistaken." *Id.* at 95-96, 113 S.Ct. at 1117.

We conclude that the same reasoning applies to Glover's testimony at his first trial. In imposing the obstruction of justice enhancement for perjury, the judge made an independent review of the record and specifically referred to three examples of willfully false statements Glover bad made under oath on matters material to the charges against him. These were (1) that he never directed Wolf, Webb to purchase Coalstar stock with monies from the Pension Fund; (2) that he believed that the money he received from Marolda was merely repayment for a loan Johnson had made to Marolda; and (3) that the meeting with Johnson and Bennett at the Italian Village Restaurant involved no discussion of kickbacks. In addition, the district judge made a general finding that Glover perjured himself on a fourth occasion when he testified contrary to his secretary, Kathy Rugendorf, and that Rugendorf had clearly testified in a truthful manner. (Sentencing Tr. at 8-9.) With respect to the first three instances cited, the district judge found that documentary

evidence and testimony clearly established that Glover had directed Wolf, Webb to purchase the Coalstar stock, and that Glover's description, under oath, of the letter he wrote to Wolf, Webb as merely a "pimp" was a "blatant piece of perjury" *(Id.* at 8.) The judge further found that Glover's description of the kickbacks he received from Marolda as mere loan repayments, and his denial that kickbacks were even discussed at the Italian Village luncheon, were equally blatant instances of perjury. *(Id.* at 9.) In making these findings, the judge thus complied in every respect with the requirements of *Dunnigan;* moreover, we discern no error, clear or otherwise, in the judge's factual determinations. As in *United States v. Jones*, 983 F.2d 1425 (7th Cir. 1993), this is plainly not a case for giving Glover "the benefit of the doubt, as we would if this were a close call." *Id.* at 1431; *see* U.S.S.G. § 3Cl.1, comment. (n.1). We therefore reject Glover's challenge to the two-point enhancement of his base offense level for obstruction of justice.

III. CONCLUSION

For the reasons stated above, Glover's conviction and sentence are

AFFIRMED.